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In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-771

COLLECTOR OF REVENUE, STATE OF LOUISIANA
Petitioner,

v.

CHICAGO BRIDGE AND IRON COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Collector of Revenue, State of Louisiana, petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Louisiana entered in the above entitled case on June 23, 1975, rehearing refused on September 5, 1975.

OPINIONS OF THE COURTS BELOW

The opinion of the Nineteenth Judicial District Court of Louisiana for the Parish of East Baton Rouge (the trial court) is not reported; in the opinion of the trial court is appended hereto and marked Appendix "1".

The opinion of the Louisiana Court of Appeal, First Circuit, is reported at 303 So.2d 750; the opinion of the Louisiana Court of Appeal, First Circuit, is appended hereto and marked Appendix "2".

The opinion of the Louisiana Supreme Court is reported at 317 So.2d 605; the opinion of the Louisiana Supreme Court is appended hereto and marked Appendix "3".

JURISDICTION

The judgment herein sought to be reviewed was entered on June 23, 1975 (see Appendix "3"), an application for rehearing timely was filed, and on September 5, 1975, the application for rehearing was refused with three out of seven Louisiana Supreme Court justices of the opinion that a rehearing should be granted. (See Appendix "4").

The Louisiana Supreme Court is the highest court of the state, and the judgment of which review is sought is a final judgment of the Louisiana Supreme Court.

Jurisdiction of this court is invoked under Title 28, United States Code, Section 1257, which provides in part as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is

drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." 28 USC 1257.

QUESTION PRESENTED

Whether Louisiana Sales-Use Tax Law (Louisiana Revised Statutes of 1950, as amended, Title 47, Chapter 2) is repugnant to United States Constitution Article I, Section 8, Clause 3 (Commerce Clause)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The provision of the United States Constitution that this case involves is Article I, Section 8, Clause 3, which provides Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes". U. S. Constitution, Article I, Section 8, Clause 3.

The statutes of the State of Louisiana involved in this case are Louisiana Revised Statutes of 1950, as amended, Title 47, Chapter 2, which are appended hereto and marked Appendix "5".

STATEMENT OF THE CASE

The Collector of Revenue, State of Louisiana, (hereinafter referred to as "Collector") is seeking to recover from Chicago Bridge and Iron Company

(hereinafter referred to as "CB&I") sales-use taxes for the period December 1, 1955 through December 31, 1960, which can be itemized as follows:

Description	*Tax*	*Interest to 6-20-72*	*Total*
Shop labor & overhead	$69,572.16	$42,991.03	$112,563.19
Transportation cost	21,917.40	6,269.93	28,187.33
GRAND TOTAL			$140,750.52

CB&I is an Illinois corporation licensed to do and doing business in the State of Louisiana.

CB&I's business in Louisiana during the audit period consisted of constructing and/or repairing steel structures such as tanks utilized in the storage of water, petroleum products, and other substances.

To fulfill contractual obligations incurred pursuant to contracts with Louisiana customers, at locations outside Louisiana, CB&I acquired from non-Louisiana vendors steel plates and other basic materials (hereinafter referred to as "raw steel"). CB&I employees at CB&I fabricating plants located outside Louisiana fabricated this raw steel by rolling, pressing, bending, edging, trimming, drilling and shaping to create component parts of structures to be constructed or repaired in Louisiana as per contracts with Louisiana customers.

For example, suppose CB&I entered into a contract with Esso Standard Oil for the construction of an oil storage tank to be erected at Baton Rouge, Louisiana plant site. CB&I would purchase outside Louisiana raw steel. Then at its shops outside Louisiana CB&I would prefabricate or create component parts of

the tank as per contract specifications. Then the prefabricated component parts would be transported into Louisiana and assembled by CB&I employees to produce the finished product, an oil storage tank.

Pursuant to Louisiana Revised Statutes of 1950, as amended, Title 47, Chapter 2, the Collector asserted sales-use tax liability on the prefabricated articles imported into and used by CB&I at job sites in Louisiana. The Collector has calculated CB&I's sales-use tax liability by applying the two per centum tax rate to the sum total of the following:

(1) The *purchase prices* paid by CB&I to out-of-state vendors for raw steel where CB&I was not charged equivalent sales-use tax in states of purchase;

(2) *Costs of shop labor and overhead* incurred by CB&I in fabricating raw steel to create component parts of structure to be constructed or repaired in Louisiana, which component parts after creation were imported into Louisiana;

(3) *Cost of transportation* (freight) incurred by CB&I in bringing the prefabricated component parts from points of origin outside Louisiana to destination within Louisiana, said destination being wheresoever in Louisiana the component parts first were used by CB&I after interstate commerce had terminated.

It is with the inclusion of costs of shop labor and overhead and transportation expenses in the sales-use

tax base that this lawsuit is concerned. CB&I does not deny application of the two per centum sales-use tax rate to the purchase prices of raw steel where no equivalent sales-use tax was paid in states of purchase.

The federal question of substance decided by the Louisiana Supreme Court is that the Louisiana Sales-Use Tax Law (Louisiana Revised Statutes of 1950, as amended, Title 47, Chapter 2) is unconstitutional as violative of United States Constitution, Article I, Section 8, Clause 3 (Commerce Clause). Respectfully it is submitted the Louisiana Supreme Court failed to apply correctly the test of comparison enunciated in *Halliburton Oil Well Cementing Company v. James S. Reily, Collector of Revenue, State of Louisiana*, 373 U.S. 64, 10 L.ed. 2d 202, 83 S.Ct. 1201, reh. den. 374 U.S. 858, 10 L.ed. 2d 1082, 83 S.Ct. 1861, for determining if a state sales-use tax scheme is violative of United States Constitution, Article I, Section 8, Clause 3 (Commerce Clause). Furthermore, it is submitted the Louisiana Supreme Court's holding that costs of ship labor, overhead, and transportation are not included within the tax base of the in-state manufacturer-user (so that to include such within the tax base of the out-of-state manufacturer-user would be discriminatory in violation of the Commerce Clause) is erroneous; the in-state manufacturer-user is taxed on costs of shop labor, overhead and transportation.

The federal question presented was raised in the court of first instance in Chicago Bridge and Iron Company's petition, which provides in part as follows:

> "Alternatively, should the Louisiana General Sales Tax Act and the regulations from time to

time issued thereunder by the defendant be construed as authorizing the application of the use tax to the expenses incurred by the plaintiff in bringing its own tangible personal property into the State of Louisiana, as contended by the defendant, then the plaintiff specifically and expressly pleads and urges the unconstitutionality of that Act and those regulations for the following reasons:

"(a) The imposition of the use tax on the expense incurred by the plaintiff in bringing tangible personal property owned by the plaintiff into the State of Louisiana in interstate commerce . . . interferes with and unduly burdens commerce among the states contrary to the third clause of Section 8 of Article I of the Constitution of the United States of America . . . ." CB&I's petition to trial court, paragraph 13.

In the answer to CB&I's petition in the trial court, the Collector specifically denied Louisiana sales-use tax was violative of the Commerce Clause.

The question whether or not Louisiana Sales-Use Tax Law violates the Commerce Clause of the United States Constitution was analyzed in detail by the trial court (see opinion of Nineteenth Judicial District Court, Appendix "1") with the trial court concluding no burden is created upon interstate commerce.

By reason of an appeal being taken by CB&I to Louisiana Court of Appeal, First Circuit, the federal question presented was raised resulting in the First Circuit Court of Appeal holding Louisiana Sales-Use Tax Law is not unconstitutional. This court respectfully is urged to review the opinion of the Louisiana Court of Appeal, First Circuit. (See Appendix "2").

By reason of the Louisiana Supreme Court granting CB&I's application for writs of certiorari to review the judgment of the Louisiana Court of Appeal, First Circuit, the federal question presented was submitted to the Louisiana Supreme Court in briefs and oral argument and was passed upon by the latter court holding Louisiana Sales-Use Tax Law unconstitutional as violative of United States Constitution, Article I, Section 8, Clause 3. (See Appendix "3").

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The Supreme Court of Louisiana has decided an important question arising under Article I, Section 8, Clause 3 of the Constitution of the United States and an important question arising under Louisiana's sales-use tax statutes; this decision is in conflict with this court's decision in *Halliburton Oil Well Cementing Company v. James S. Reily, Collector of Revenue, State of Louisiana*, 373 U.S. 64, 10 L.ed. 2d 202, 83 S.Ct. 1201, reh. den. 374 U. S. 858, 10 L.ed. 2d 1082, 83 S.Ct. 1861.

In *Halliburton, supra*, in a joint stipulation of facts, the Collector admitted the following:

> "If Halliburton had purchased its materials, operated its shops, and incurred its labor and shop overhead expenses at a location within the State of Louisiana, there would have been a sales tax due to the State of Louisiana upon the cost of materials purchased in Louisiana and a use tax on materials purchased outside of Louisiana; *but there would have been no Louisiana sales or use*

tax due upon the labor and shop overhead." *Halliburton, supra,* 10 L.ed. 2d 204 at 205. (Emphasis added)

The Collector erroneously stipulated the underliner in the immediately preceding quotation from *Halliburton, supra.* Indeed there would have been sales-use tax due upon the labor and shop overhead.

In *Halliburton,* supra, this court indicated a number of times that the admission in the stipulation was binding and, thus, decisive of the case. CB&I has sought to take advantage of a mistake of the Collector's agent (Attorney for the Department) in admitting to an incorrect stipulation, hoping to use the incorrect stipulation in *Halliburton, supra,* to convince this court that unconstitutional discrimination exists in Louisiana Sales-Use Tax Law.

The court's attenton is invited to the trial judge's Written Reasons for Judgment, which are quoted as follows:

> "This Court is persuaded that the stipulation of fact contained in *Halliburton* was fundamentally erroneous. Since it was obviously the dominant factor in that decision, this Court does not feel compelled to follow it." Written Reasons for Judgment, 19th Judicial District Court, page 11, 1st paragraph. (See Appendix "1").

In addition this court's attention is invited to the opinion of the First Circuit Court of Appeal:

> "At the trial of the instant case, the foregoing Halliburton stipulation was convincingly shown to be erroneous. All of the witnesses testi-

> fying on behalf of the Collector concerning the Halliburton stipulation and the policy of the Department of Revenue lead only to the conclusion that the Halliburton stipulation does not correctly state the Department's policy or its actual application of Louisiana's use tax laws." Opinion of the First Circuit Court of Appeal, page 1, last paragraph. (See Appendix "2").

Also, this court's attention is invited to the record of this case to review the testimony of Mr. Chapman Sanford, attorney in the Collector's Legal Division, wherein it is stated that Mr. Sanford signed the *Halliburton* stipulation without knowing anything about the case upon request of Mr. Roy Lilly, the Collector's attorney who was handling the case but who could not be present due to his father's death. See transcript, pages 32-34. (Appendix "6"). Furthermore, it is very important that this court carefully note the testimony of Mr. Roy Lilly, Jr. See transcript, pages 42-44. (Appendix "7"). Mr. Lilly testified that he *had not read the Halliburton stipulation prior to his giving instructions by radio telephone to Mr. Sanford to sign it* although Mr. Lilly had done much work preparatory toward a stipulation. Also, note Mr. Lilly's testimony that the *stipulation did not reflect Departmental Policy and that he had various epithets directed to him from Departmental personnel for mistakenly authorizing the execution of the stipulation.* See transcript, pages 32-44. (Appendix "7").

In light of the above discussion explaining that the U. S. Supreme Court *Halliburton* case, *supra*, was decided on an incorrect stipulation of facts which ad-

mitted *inequality* which is non-existent under the Louisiana Sales-Use Tax Law, *this Honorable Court respectfully is urged carefully to study the Louisiana Sales-Use Tax Law (Appendix "5") to see that there* is equality and that no unconstitutional discrimination exists. Indeed,

> "When the account is made up, the stranger from afar is subject to no greater burden as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed." *Henneford v. Silas Mason Co.*, 57 S.Ct. 524, 81 L.Ed. 814, (1937).

After the trial court and the intermediate appeal court found the *Halliburton* stipulation convincingly shown to be erroneous by the record in the case at bar, the Louisiana Supreme Court held *Halliburton, supra*, required reversal and further held that Louisiana Sales-Use Tax Law violates the commerce clause of the U. S. Constitution. Respectfully, it is submitted the Louisiana Supreme Court's findings of fact are erroneous; Louisiana Sales-Use Tax Law complies with the equality mandated by *Halliburton*, supra, as to treatment of the in-state and out-of-state manufacturer-user. Thus, *Halliburton, supra*, is authority for this court to reverse the holding of the Louisiana Supreme Court.

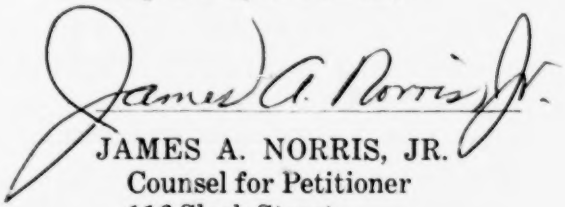
Furthermore, this court is urged carefully to study the opinion of the Louisiana Supreme Court (Appendix "3") to conclude that the Louisiana Su-

preme Court incorrectly applied the test of comparison enunciated in *Halliburton*, *supra*, for determining if a state sales-use tax scheme is violative of United States Constitution, Article I, Section 8, Clause 3. If the comparisons utilized by the Louisiana Supreme Court are correct, then no state sales-use tax legislation equally taxing the costs of shop labor, overhead, and transportation of the in-state and out-of-state manufacturer-user can be constitutional.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

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Rendered and filed in the records on May 31, 1973

APPENDIX "1"

Number 99,681—Division "B"
19th Judicial District Court,
Parish of East Baton Rouge,
State of Louisiana

CHICAGO BRIDGE & IRON COMPANY
VERSUS
COLLECTOR OF REVENUE, STATE OF LOUISIANA

WRITTEN REASONS FOR JUDGMENT

Plaintiff, Chicago Bridge and Iron Company (hereinafter "CB&I"), an Illinois corporation authorized to do and doing business in Louisiana, filed this suit against the defendant, Louisiana Collector of Revenue (hereinafter the "Collector") seeking a refund of certain use taxes paid under protest in the amount of Twenty seven thousand nine hundred ninety-two and one/100 ($27,992.01) Dollars, including interest. The Collector filed a reconventional demand, later amended, seeking recovery of Ninety one thousand four hundred eighty-nine and fifty-six/100 ($91,489.56) Dollars, representing an alleged use tax liability of "CB&I" incurred during a period from December 1, 1955, through December 31, 1959, less Twenty eight thousand one hundred eighty and thirty-three/100 ($28,180.33) Dollars which "CB&I" paid under protest. Defendant in reconvention, "CB&I", has filed peremptory exceptions of prescription and no

cause of action in opposition to the reconventional demand.

During the period involved, "CB&I" as contractor for the improvement of immovable property in Louisiana, entered into several construction contracts in Louisiana. To fulfill its obligation "CB&I" would purchase steel plates and other basic steel materials from out of state vendors and transport them by common carrier to its nearby fabricating plants, also out of state. There the steel plates were processed by mechanically rolling, pressing, bending, edging, trimming and dulling the said material. After fabrication these parts were shipped to Louisiana where they were incorporated into various structures (e.g. oil and water tanks) on the job site.

Plaintiff complains that during the period of this activity within Louisiana, the Collector of Revenue wrongfully assessed sales-use taxes against "CB&I", on the property purchased and improved outside of Louisiana and then transported into this sale for ultimate use. Plaintiff does not dispute the tax on the purchase price of these raw materials, paid by "CB&I", but does dispute the validity of deficiency assessments based on the following elements of value added to the raw materials.

(a) Transportation costs.
(b) Direct labor costs.
(c) Shop overhead

Specifically, plaintiff contends that the sales-use tax laws of Louisiana (LSA-R.S. 47:301-318) do not

impose a use tax on the above listed elements. The Collector, however, insists that these added value elements are subject to the Louisiana use tax.

LSA-R.S. 47:302(A)(2) provides:

> "A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:
>
> (2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax."

From this it is clear that the use tax is applicable to any element of the "cost price". That term is defined in LSA-R.S. 47:301(3) as follows:

> " 'Cost Price' means the actual cost of the articles of tangible personal property without any deductions therefrom on account of the cost of materials used, labor or service cost, transportation charges or any other expenses whatsoever; or the reasonable market value of the tangible personal property at the time it becomes susceptible to the use tax; whichever is less."

Therefore, the Louisiana use tax statutes do contemplate taxation of certain property purchased out of state and brought into Louisiana, inclusive of the added value elements of costs of transportation, labor and shop overhead. In reference to the moment of ap-

plication of the use tax, Mr. Justice Clark in a dissenting opinion in the case of *Halliburton Oil Well Co. v. Reily*, 373U.S.64, 10L.ed. 2nd 202, 83S.Ct. 1201, correctly noted:

> "That incidence is the moment that the product becomes a part of the mass of property within the State."

It seems obvious then that the "cost price" of materials subject to the Louisiana use tax is determined by the value of that object at the moment it "becomes a part of the mass of property within the state". Further, according to the R.S. 47:301(3) definition of "cost price", labor and overhead costs, costs of transportation and costs of raw materials are all includable elements of added value which when aggregated comprise the taxable base of the use tax.

Although counsel for "CB&I" assert that the case of *Dunham Rentals, Inc. v. West Feliciana Parish School Board*, 241 So. 2nd 295 (La. App. 1st. Cir. 1970) holds that costs of transportation are not taxable under the Louisiana sales-use tax statutes, that case is inapposite as it deals with the taxation of "sales of services", not sales or use of goods as in this case.

This Court must conclude therefore, that the Louisiana sales-use tax statutes do contemplate a use tax on property purchased out-of-state and imported to Louisiana for final use or consumption, inclusive of the elements of direct labor costs, shop overhead costs and costs of transportation incurred prior to the final arrival of the object in Louisiana.

Counsel for "CB&I" next argue that a use tax on

the elements of labor and shop overhead and transportation costs on imported steel, processed out-of-state, is unenforceable because such a tax violates the rights of "CB&I" under the Constitution of Louisiana and the United States. Specifically, it is urged that such taxation would create an unreasonable burden on interstate commerce and amount to a denial of property without due process of law, thereby violating the protections guaranteed in Article I, Section 8, Clause 3 (The Commerce Clause) of the United States Constitution; Amendments 5 and 14 of the United States Constitution; Article I, Section 2 of the Louisiana Constitution of 1921; and Article 10, Section I of the Louisiana Constitution of 1921.

The essence of plaintiff's argument is that the use tax on materials purchased out-of-state, processed out-of-state, and imported to Louisiana for ultimate use is more burdensome than the complementary sales tax on the same materials purchased and processed in Louisiana. Plaintiff avers that had it purchased its basic steel products from a Louisiana supplier and processed the steel in Louisiana after said initial purchase, no sales or use tax would be due on any post-sale labor and shop overhead costs (incurred in processing the steel), or on any post-sale costs of transportation to the intra-state locus of ultimate use.

The Collector admits that the sales and use taxes should stand as complements to each other, thereby providing a uniform scheme of taxation.

In this relation, Article 2-3 of the Louisiana Collector's Regulations provides in part:

> "The Use Tax applies to the use of property purchased in interstate commerce, or in other states for the purpose of use in this state after interstate commerce had ended. For purposes of taxation, interstate commerce ends when purchased property reaches the consignee, and comes to rest within the state. The tax does not attach until the property has come to rest in the State of Louisiana.
>
> Generally, it may be said that the Use Tax applies to the use of property in this State, the sale of which would be subject to tax had there been a purchase within this State. The Use Tax does not apply upon the use of any property which has been subjected to a sales tax in another State at a rate equal to or greater than the rate of tax imposed by the Louisiana General Sales Tax Act, nor does the Use Tax apply upon the use of any property which is exempt from the tax imposed upon the sale at retail by the Louisiana General Sales Tax Act. The two Taxes, Sales and Use stand as complements to each other and taken together provide a uniform tax upon either the sale at retail or use of all tangible personal property irrespective of where it may have been purchased."

The question is, however, whether in its actual operation the Louisiana sales-use tax scheme operates uniformly, or favors the intra-state transaction. As provided by the United States Supreme Court in *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, 10L.ed. 2nd 202, 83 S.Ct. 1201 (1963):

> ". . . equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions."

Therefore, a comparison must be made between similar intra-state and interstate transactions in order to determine if the use tax is more onerous than the sales tax. Assume, for the sake of convenience, that "CB&I" purchased Sixty thousand and no/100 ($60,000.00) Dollars of basic steel materials from an out-of-state supplier. Assume further that said materials were fabricated out-of-state at a cost of Thirty thousand and no/100 ($30,000.00) Dollars for labor and shop overhead and after fabrication were transportated to Louisiana for ultimate use, at a cost of Ten thousand and no/100 ($10,000.00) Dollars. At the moment of taxation, the Collector will assess a use tax of two (2%) percent on the "cost price" of One hundred thousand and no/100 ($100,000.00) Dollars, composed of the cost of raw materials ($60,000.00), the cost of shop labor and overhead ($30,000.00) and the cost of transportation ($10,000.00). Thus the total amount of use tax due would be $2,000.00 (2% of $100,000.00).

Now assume that "CB&I" chose instead to purchase its raw steel materials from a Louisiana supplier. The sales price will include not only the Sixty thousand and no/100 ($60,000.00) Dollars basic cost, but also the cost of transportation to Louisiana, as no steel is produced in Louisiana. This is apparent from the LSA-R.S. 47:301(13) definition of "sales price" which provides in pertinent part as follows:

> " 'Sales Price' means the total amount for which tangible personal property is sold, including any services . . . that are a part of the sale valued in

> money, whether paid in money or otherwise, and includes the cost of materials used, labor or service costs . . ."

Surely the cost of transportation to the place of sale in a "service cost" included in the sales price in a sale at retail. In the case of *State v. Menefee Motor Co.*, 139 So.61 (La. App. Orleans 1932) the Court of Appeal disallowed the deduction of freight charges (from the factory of the retail outlet of an automobile dealer) from total gross sales, for license tax purposes. The Court of Appeal also noted:

> "That, in selling cars to its customers, the defendant adds a profit fixed by the manufacturer to the F.O.B. price, and also divides the freight charged by the manufacturer and paid by the defendant company so as to prorate it equally to each car and adds said proration to the customer's bill."

Therefore, this Court must conclude that transportation charges to the place of ultimate sale are included in the retail sales price. Whether the transportation charges in the instant hypothetical sale will be Ten thousand and no/100 ($10,000.00) Dollars, as both shipments to Louisiana are of the same distance. Of course, if the Louisiana supplier finds a nearer source of the steel materials, the transportation costs will be lessened, or if a more distant source is chosen, the transportation costs will be increased. However, since the same sources would be available to the Louisiana purchaser-supplier, or to "CB&I" directly, the tax on the transportation costs would be equivalent whether "CB&I" purchases in Louisiana and pays a Two (2%)

percent sales tax, or purchases out-of-state, imports the goods, and pays a Two (2%) percent use tax. Thus, the in state purchase is not granted any financial advantage over the out-of-state purchaser-importer in relation to the tax charged on transportation costs.

This conclusion is reinforced by the case of *Mouton v. Klatex, Inc.*, 238 So. 2nd 1 (La. App. 1st. Cir. 1970) wherein the Court of Appeal held:

> ". . . Louisiana may constitutionally so include transportation charges in the cost price or tax basis for imposition of the use tax."

Necessarily implicit in this holding is the fact that transportation charges must be includable in the sales price for sales tax purposes. This is so because the case of *Henneford v. Silas Mason Co.*, 300 U.S. 577, 81 Led 814, 57 S. Ct. 524 (1937), in upholding the constitutionality of a Washington state use tax, noted:

> "Equality is the theme that runs through all the sections of the statute. There shall be a tax upon the use, but subject to an offset if another use or sales tax has been paid for the same thing. This is true where the offsetting tax became payable to Washington by reason of purchase or use within the state. It is true in exactly the same measure where the offsetting tax has been paid to another state by reason of use or purchase there. No one who uses property in Washington after buying it at retail is to be exempt from a tax upon the privilege of enjoyment except to the extent that he has paid a use or sales tax somewhere. Every one who has paid a use or sales tax anywhere or, more accurately in any state, is to that extent to

> be exempt from the payment of another tax in Washington.
>
> When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed."

Therefore, a state use tax is constitutionally valid only if it is no more burdensome than the correlative state sales tax, which applies only to intra-state sales. It is evident in the instant case that the Louisiana sales and use taxes are equally applied in relation to the tax basis element of transportation costs.

Now, the Court must determine whether the Louisiana sales and use taxes are equally applied in relation to the tax basis elements of direct labor and shop overhead costs. Counsel for "CB&I" strongly urge that this issue was decided by the United States Supreme Court in the *Halliburton* case (supra). Therein the taxpayer-appellant was engaged in the business of servicing oil wells in several oil producing states, including Louisiana. Its business required the use of certain specialized equipment including oil well cementing trucks and electrical well logging trucks. All of this equipment was manufactured by the taxpayer at its Duncan, Oklahoma, plant, after purchasing the requisite components on the open market. The taxpayer then shipped several units of this specialized equipment to Louisiana for use. The taxpayer challenged the imposition of the use tax by the Collector of

Revenue of Louisiana on the elements of labor and shop overhead costs of these units. The Supreme Court held as follows:

> "... we conclude that the Louisiana use tax as applied to the appellant's specialized equipment discriminates against interstate commerce."

However, it must be noted that the *Halliburton* case included the following stipulation of facts:

> "If Halliburton had purchased its materials, operated its shops, and incurred its Labor and Shop Overhead expenses at a location within the State of Louisiana, there would have been a sales tax to the State of Louisiana upon the cost of materials purchased in Louisiana and a Use Tax on materials purchased outside of Louisiana; but there would have been no Louisiana sales tax or use tax due upon the Labor and Shop Overhead."

Counsel for the Collector in the instant case presents the argument that the *Halliburton* stipulation was erroneous, and should not be binding on the Collector in the instant case. Counsel for "CB&I", however, contend that the stipulation contained in *Halliburton* accurately represents the policy of the State of Louisiana, at least during the period in controversy.

Upon trial on the merits, it was established by a clear preponderance of the evidence that the Louisiana sales tax is assessed against the elements of labor and shop overhead on material purchased, fabricated, and ultimately used or consumed in Louisiana. For example, Claude Broussard, who has been employed by the Louisiana Department of Revenue since 1949,

testified that shop labor and overhead and transportation costs were always included in computing sales and use taxes in Louisiana. Ferdinand J. Ivy, a sales tax director of the Department of Revenue testified that any fabrication of materials done off the job site is taxable, but that generally on-site fabrication is excluded from taxation. Several in-state fabricators also testified that costs of shop labor, shop overhead and transportation were included in the sales tax by the Louisiana Department of Revenue, with the sole exemption of on-site Labor.

This Court is persuaded that the stipulation of fact contained in *Halliburton* was fundamentally erroneous. Since it was obviously the dominant factor in that decision, this Court does not feel compelled to follow it.

However, it must still be ascertained whether in its actual application, the Louisiana use tax is more burdensome, in dollars and cents, than the correlative sales tax in relation to the elements of direct labor and shop overhead. Therefore it becomes necessary to examine the actual operation of the assessment of the sales tax in Louisiana as to these elements.

It has already been established that the use tax is imposed upon imported property the moment it leaves interstate commerce and becomes a part of the mass of property in Louisiana. However, as provided by LSA-R.S. 47:302(A)(1) the sales tax is imposed at the time of retail sale. As defined by LSA-R.S. 47:301-(10):

> " 'Retail sale', or 'sale at retail', means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property, and shall mean and include all such transactions as the collector, upon investigation, finds to be in lieu of sales; provided that sales for resale must be made in strict compliance with the rules and regulations. Any dealer making a sale for resale, which is not in strict compliance with the rules and regulations, shall himself be liable for and pay the tax."

In the hypothetical example wherein "CB&I" purchased steel materials, fabricated and assembled a completed structure, all within the State of Louisiana, it must be determined when there is a "sale at retail", for only then will the sales tax be imposed. In construing Article 2-36 of the Regulations of the Louisiana Collector of Revenue, it becomes apparent that the initial sale to "CB&I" from the Louisiana supplier, is not a "sale at retail", and therefore not subject to the sales tax. Article 2-36 provides in pertinent part as follows:

> "The following wholesale sales are not subject to the tax . . . (2) Sales of tangible personal property or products to a manufacturer, or compounder, which enter into and become ingredients or component parts of tangible personal property for resale, are sales for processing and not taxable."

Since "CB&I" is a manufacturer of steel components, used in erecting various structures, its initial purchase of raw steel material must be deemed a "sale

for resale" and therefore not taxable. Therefore, the sales tax must be imposed when the steel components are sold to the landowner-ultimate consumer (usually in the form of an assembled structure) in Louisiana. Testimony from certain in-state fabricators substantiated this conclusion. Further, as a sale of tangible personal property, to a consumer, not for resale, this transaction comes with the definition of "retail sale" found in LSA-R.S. 47:301(10). Therefore, the sales price at the moment of retail sale of the steel components will reflect the enhanced value of this property due to fabrication costs (labor and shop overhead) and transportation costs. It should be remembered that the LSA-R.S. 47:301(13) definition of "sales price" includes the value of any services added to the total amount for which the tangible personal property is sold.

Therefore, it would seem that the sales-use tax is applied uniformly on the elements of labor and shop overhead, whether such fabrication costs are incurred out of state or in Louisiana. Clearly both taxes are in fact imposed and at the same rate of two (2%) percent. The tax basis for either tax includes the cost elements of labor, shop overhead, and transportation costs: Dollar for dollar, no preference is given the intra-state manufacturer-fabricator, thus no burden is created on interstate commerce.

The final issues presented for adjudication concern the peremptory exceptions of prescription and no cause of action filed on behalf of defendant-in-reconvention, "CB&I". Exceptor first contends that the

Ninety one thousand four hundred eighty-nine and fifty-six/100 ($91,489.56) Dollars, less a credit for Twenty eight thousand one hundred eighty and thirty-three/100 ($28,180.33) Dollars, plus interest and attorney's fees, claimed by plaintiff in reconvention is not recoverable since the reconventional demand was filed on behalf of the Collector, after the running of the three year prescriptive period provided in Article XIX, Section 19, of the Louisiana Constitution of 1921. That article provides in pertinent part as follows:

> ". . . that all taxes and licenses, other than real property taxes, shall prescribe in three years from the 31st day of December in the year in which such taxes or licenses are due."

The Collector, however, argues that the reconventional demand, filed on August 8, 1967, (and later amended) was filed timely. The basis of this contention rests upon certain agreements between these parties wherein they mutually consented to suspend prescription. The first of these agreements was confected on November 25, 1959, providing that prescription against the assessment and collection of sales-use taxes would be suspended through December 31, 1960. Subsequent agreements extended said suspension through March 31, 1964. On March 20, 1964, "CB&I" filed this suit, which was answered on April 17, 1964. On November 22, 1965, "CB&I" filed a motion for summary judgment. On January 6, 1966, the defendant filed exceptions of no cause and no right of action, as well as a motion for summary judgment. On June 2, 1967,

"CB&I" filed a motion for continuance. Finally the reconventional demand was filed on behalf of the Collector on August 8, 1967, which was amended on February 20, 1970.

There is no doubt as to the validity of the prescription-suspension agreements herein. LSA-R.S. 47:1500 provides in pertinent part:

> "The running of such prescription may also be suspended by means of a written agreement between the taxpayer and the Collector made prior to the lapse of the prescriptive period set out in the Constitution of Louisiana."

However "CB&I" contends that since the last suspension agreement expired on March 31, 1964, and the reconventional demand was filed more than three years thereafter, the Collector is barred from seeking that recovery. However, 47:1580 provides in pertinent part as follows:

> "The prescription running against any state tax . . . shall be interrupted by:
> (3) The filing of any pleadings, either by the Collector or by a taxpayer with the Board of Tax Appeals or any state or federal court."

Counsel for "CB&I" contend that the suit filed on March 20, 1964, concerned a dispute as to the sole question of use tax liability of "CB&I" as assessed against the "cost price" element of transportation charges, any pleadings filed therein would have no effect on the running of prescription on a question of the "cost price" elements of labor and shop overhead. However, this Court is of the opinion that this position

is too restrictive. This lawsuit, as well as the prescription-suspension agreements relates to the question of the extent of liability of "CB&I" under the Louisiana sales-use tax statutes for a period from December 1, 1955 to December 31, 1959. The reconventional demand filed on behalf of the Collector concerns the extent of that liability in relation to the elements of labor and shop overhead, which is merely an integral part of the overall dispute, i.e. the extent of "CB&I's" sales-use tax liability in this period. Therefore, this Court is persuaded that each filing of pleadings in this case between March 20, 1964, when suit was filed, and August 8, 1967, when the reconventional demand was filed, operated within the scope of R.S. 47:1580(3), thereby interrupting prescription. Therefore the reconventional demand was timely filed and the peremptory exception of prescription must be dismissed.

Finally, counsel for "CB&I" assert that the Collector is not entitled to the requested ten (10%) percent attorney's fee. The Collector's right to assess such fees is set out in R.S. 47:1512 as follows:

> "The Collector is authorized to employ private counsel to assist in the collection of any taxes, penalties or interest due under this Sub-title, or to represent him in any proceeding under this Subtitle. If any taxes, penalties or interest due under this title are referred to an attorney at law for collection, an additional charge for attorney fees, in the amount of ten per centum (10%) of the taxes, penalties and interest due, shall be paid by the tax debtor."

The Collector seeks this penalty only in relation

to the use tax due and arising on the elements of shop labor and overhead. However, this Court notes that no formal demand for payment was made by the Collector until the filing of the reconventional demand on August 8, 1967. Had a demand been asserted prior thereto, this Court has no reason to doubt that "CB&I" would have paid the assessment under protest, as was its policy on the use tax assessment of Twenty eight thousand one hundred eighty and thirty-three/100 ($28,180.33) Dollars thereby avoiding the imposition of attorney fees.

In the case of *State v. Sinclair Refining Co.*, 195 La. 288, 196So. 349 (1940), the State claimed that the taxpayer owed a penalty (attorney fees) for delinquent payment of the full amount of tax on a certain amount of gasoline sold to another oil corporation. The Louisiana Supreme Court held:

> "We reject this claim for the reason that, while it is true the payments were not made within the time prescribed by law, yet they were made, and the state received the entire amount due, and, so far as the record discloses, made no complaint and made no demand for the payment of penalties until the filing of this suit. This claim for penalties is stale . . . This Court has repeatedly held that penalties in civil actions are not favored by the courts."

In the instant case this Court is of the opinion that the Collector's failure to make a demand upon "CB&I" of a fair opportunity to pay the tax, with or without protest. Accordingly this Court holds that the Collector's claim for attorney's fees should be denied.

For the above and foregoing reasons, judgment shall be rendered herein in favor of the defendant, Louisiana Collector of Revenue, dismissing the main demand of plaintiff, Chicago Bridge and Iron Company; in favor of the "Collector", as plaintiff-in-reconvention, and against Chicago Bridge and Iron Company, as defendant-in-reconvention, and against Chicago Bridge and Iron Company, as defendant-in-reconvention casting the latter in judgment for Ninety one thousand four hundred eighty-nine and fifty-six /100 ($91,489.56) Dollars, less a credit of Twenty seven thousand nine hundred ninety-two and one/100 ($27,992.01) Dollars paid under protest by "CB&I", for a sum total of Sixty three thousand three hundred nine and twenty-three/100 ($63,309.23) Dollars plus accrued interest; in favor of the Collector and against exceptor, Chicago Bridge and Iron Company, dismissing exceptor's peremptory exception of prescription filed in opposition to the reconventional demand filed on behalf of the Collector; and in favor of exceptor, Chicago Bridge and Iron Company and against the Collector, sustaining the exception of no cause of action, thereby denying the Collector's request for attorney's fees of ten percentum (10%).

Judgment will be signed accordingly.

Baton Rouge, Louisiana, this 31st day of May, 1973.

_____

Judge

Rendered and filed in the records on November 12, 1974.

APPENDIX "2"

Number 9975
First Circuit Court of Appeal
State of Louisiana

CHICAGO BRIDGE & IRON COMPANY
VERSUS
ROLAND COCREHAM,
COLLECTOR OF REVENUE

ON APPEAL FROM THE
NINETEENTH JUDICIAL DISTRICT COURT,
PARISH OF EAST BATON ROUGE,
HONORABLE ELVEN E. PONDER, JUDGE.

BEFORE: LOTTINGER, COVINGTON AND BAILES, JJ. COVINGTON, J.

Chicago Bridge & Iron Company, the taxpayer herein, filed this suit against the Collector of Revenue for the State of Louisiana, seeking a refund of certain use taxes paid under protest. The Collector filed a reconventional demand for additional use taxes, and also made a subsequent claim for attorney's fees; to which actions the taxpayer filed exceptions of prescription and no cause of action.

During the taxable period the taxpayer, an Illinois corporation authorized to do and doing business in the State of Louisiana, was engaged in the business of constructing specialized steel plate structures, such as storage tanks, generally for municipalities and cor-

porations. The structures built by the taxpayer consisted primarily of fabricated steel plates assembled by the taxpayer's employees on prepared foundations at the job site. Unfinished steel plates were purchased by the taxpayer from out-of-state suppliers, and carried to the taxpayer's out-of-state shops where the steel plates were fabricated with labor and overhead expenses paid by the taxpayer. After fabrication the steel plates were usually transported at the taxpayer's expense from its out-of-state shops by common carrier to Louisiana job sites.

Basically this suit involves the application and validity of the Louisiana use tax to the activities of Chicago Bridge & Iron Company, the taxpayer, during the taxable period. On December 6, 1972, the suit was tried, with most of the facts stipulated. In general, the testimony of the witnesses concerned the policy and practice of the Department of Revenue with regard to the assessment and collection of the use tax during the taxable period.

After considering the evidence and the briefs of counsel, the trial court, having assigned written reasons, rendered judgment dismissing the taxpayer's claim for a refund and its exception of prescription, and granting the Collector the additional use tax claimed. The judgment also rejected the Collector's claim for attorney's fees. Motions for new trial by both parties were denied. Then both parties appealed the judgment.

The taxpayer concedes that a use tax based on the purchase price paid for the unfinished steel plates to

the out-of-state sellers was owed to the State of Louisiana; and it having been paid, there is no dispute on this item. There is also no dispute as to the amount of the use tax due, the amount having been stipulated at the trial, if the Court decides that the taxpayer owes additional use taxes.

The taxpayer complains that the Collector employed an incorrect tax base in that he included the element of labor and shop overhead expenses for fabricating the steel plates in the taxpayer's out-of-state shops and the element of transportation expenses paid by the taxpayer to transport the fabricated steel plates from its out-of-state shops to Louisiana job sites. Specifically the taxpayer contends that the Louisiana sales-use tax laws do not impose a use tax on labor and shop overhead expenses and transportation expenses. Of course, the Collector asserts that he employed the correct tax base.

The trial court found, with which finding we agree, that by a preponderance of the evidence the following pertinent facts were established: Chicago Bridge & Iron Company purchased its raw materials, operated its fabricating shops, incurred its labor and overhead expenses at out-of-state locations; and further the taxpayer incurred transportation expenses in shipping its fabricated materials by common carrier from its out-of-state locations to Louisiana job sites. No sales or use tax was paid by the taxpayer on any of these activities.

In addition to the tax upon the cost of the raw materials (which tax is not disputed), the Collector seeks

to collect a use tax based upon the labor and shop overhead expenses and the transportation expenses.

The facts further establish that if the taxpayer had purchased its materials, operated its fabricating shops, and incurred its labor and overhead expenses at in-state locations, there would have been due to the State of Louisiana a sales tax upon the cost of the materials purchased in this State and a use tax on materials purchased out-of-state. There would also have been a Louisiana sales tax or use tax due to the State of Louisiana upon the labor and shop overhead expenses and the transportation expenses.

Concerning these established pertinent facts there are two basic questions to be answered:

First, what is the proper tax base for the Collector to employ in collecting the Louisiana use tax?, and

Secondly, is the Louisiana use tax constitutional?

The first question concerning the proper tax base for the use tax has largely been answered by this Court in the recent case of Mouton v. Klatex, Inc., La. App., 238 So.2d 1 (1st Cir. 1970), writ refused 239 So.2d 365, and application denied by United States Supreme Court, 401 U.S. 968, 91 S.Ct. 1192.

In Klatex, the Collector sued to recover use taxes from Klatex, Inc., using as the tax base the purchase price and the transportation expenses. Klatex, Inc. purchased goods in Arkansas for use in Louisiana and purchased separate from the purchase price of the goods transportation from common carriers, which then delivered the goods to Louisiana destinations. The

trial court ruled that such transportation expenses were not includable in the "cost price" of the goods, with the result that no additional use tax was due the State. The Court of Appeal reversed the judgment of the trial court, holding that such transportation expenses are included in the "cost price" or tax basis for imposition of the use tax.

In its opinion in the Klatex case, the Court said:

> "We feel the legislative intent is clear and that transportation charges and any other expenses 'whatsoever' are not to be deducted from cost price in figuring the tax basis for imposition of the use tax."

The reasoning of the Court in the Klatex case in determining that transportation expenses are properly includable as an element of the tax base is equally applicable to the question of whether labor and shop overhead expenses are includable as an element of the tax base of the use tax.

La. R.S. 47:302 is the basic statute imposing the sales-use tax in Louisiana. This statute provides in part:

> "There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows: . . .
>
> "(2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is

> used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax."

Where the tax liability exists because there is use or consumption of tangible property in Louisiana, the measure of the use tax liability is two per centum of the "cost price" of each item or article of tangible personal property. La. R.S. 47:302 A. (2).

"Cost price" is defined in La. R.S. 47:301 (3) as follows:

> " 'Cost price' means the actual cost of the articles of tangible personal property without any deductions therefrom on account of the cost of materials used, labor or service cost, transportation charges or any other expenses whatsoever. . ."

There is no language in the statutory definition of "cost price" to suggest that the term is restricted to "purchase price of raw materials only." The term explicitly means "actual cost" of the articles of tangible personal property and is made even more definite by the express statement that "cost of materials used, labor or service cost, transportation charges or any other expenses whatsoever" are not to be deducted in arriving at the "cost price" of the property.

Moreover, La. R.S. 47:303 A. states that the use tax is paid on all articles of tangible personal property imported and used, "the same as if the said articles had been sold at retail for use or consumption in this state." This statute was correctly interpreted by the Court in Fontenot v. S.E.W. Oil Corporation, 232 La. 1011, 95 So.2d 638 (1957), as follows:

> "These provisions, along with the others above mentioned, clearly indicate that the 'use' tax is to be computed on the retail price the property would have brought when imported that is, its then value or worth."

In addition to the above citations and the language used in defining "cost price," we consider the following applicable portion of La. R.S. 47:305 (5):

> ". . . It is, however, the intention of this Chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state."

As pointed out by the Court in Mouton v. Klatex, Inc., supra, in discussing this section:

> "The taxable moment or time when the use tax may properly be imposed is when the property has been withdrawn from interstate commerce and has become part of the mass of the property of the taxing state."

This determination of the incidence of tax is supported by the dissenting opinion of Justice Clark, joined by Justice Black, in the Halliburton case, 373 U.S. 64 (1963), infra, as follows:

> ". . . the incidence of tax in Louisiana's Tax Act . . . is the moment that the product becomes a part of the mass of property within the State. It matters not what happens to the property subsequently. The tax attaches to the property in its form at that specific time."

Consequently, we agree with the trial court that, according to Louisiana's Tax Act, particularly La. R.S. 47:301(3), costs of raw materials, labor and shop overhead expenses, transportation expenses, and all other related expenses are "all includable elements of added value which when aggregated comprise the taxable base of the use tax."

The second question to be answered is whether the Louisiana use tax is constitutional. The taxpayer argues on this question that a use tax encompassing the elements of labor and shop overhead and transportation expenses is unenforceable, because it violates the rights of the taxpayer under the constitutions of Louisiana and the United States. Specifically the taxpayer urges that the use tax claimed by the Collector in this suit is illegally discriminatory, thereby violating the protections guaranteed in Article I, Section 8, Clause 3 (the commerce clause) of the United States Constitution and in Article 10, Section 1 and Article 1, Section 2 of the Louisiana Constitution of 1921.

The main thrust of the taxpayer's attack is aimed at the alleged discriminatory effect of the state's use tax, which was held to be unconstitutional in its application by the United States Supreme Court in the case of Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 83 S.Ct. 1201 (1963), rehearing den. 374 U.S. 858, 83 S.Ct. 1861 (1963).

We must say at the outset that we do not feel constrained to follow the Halliburton decision. The stipulation of facts on which that decision rested are as follows:

> "If Halliburton had purchased its materials, operated its shops, and incurred its Labor and Shop Overhead expenses at a location within the State of Louisiana, there would have been a sales tax due to the State of Louisiana upon the cost of materials purchased in Louisiana and a Use Tax on materials purchased outside of Louisiana; but there would have been no Louisiana sales or use tax due upon the Labor and Shop Overhead."

At the trial of the instant case, the foregoing Halliburton stipulation was convincingly shown to be erroneous. All of the witnesses testifying on behalf of the Collector concerning the Halliburton stipulation and the policy of the Department of Revenue lead only to the conclusion that the Halliburton stipulation does not correctly state the Department's policy or its actual application of Louisiana's use tax laws. The only evidence that might be construed to be contradictory on this point was the testimony of one witness for the taxpayer offered on rebuttal.

In the instant case, the trial court found by a clear preponderance of the evidence that the Louisiana use tax is imposed on the elements of labor and shop overhead and transportation expenses. The evidence demonstrates that if the same activity here sought to be taxed by the Collector had occurred entirely within the State of Louisiana, there would have been a sales tax on the expenses to the taxpayer of labor and shop overhead of fabricating the steel plates, and also a sales tax on the expenses of transporting the fabricated steel plates from an in-state fabricating shop to a Louisiana job site. The tax has always been non-

discriminatory in its operation, according to the uncontroverted evidence in the instant case.

In the case of Henneford v. Silas Mason Co., 300 U.S. 577, 57 S. Ct. 524 (1937), Justice Cardozo declared that a use tax is not discriminatory where "the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates." As approved in Silas Mason, the purpose of such a sales-use tax system is to make all tangible personal property used or consumed in the state subject to a uniform tax burden regardless of whether the property is acquired within the state, making it subject to the sales tax, or from without the state, making it subject to a use tax at the same rate. "Equality is the theme," in Silas Mason; the use tax is "upon one activity" and the sales tax is "upon another activity," but "the sum is the same when the reckoning is closed."

The established facts herein bring the instant case comfortably within the "equality" rule of Silas Mason, supra.

"The conclusion is inescapable," in the language of the Halliburton case, supra, "equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state."

We hold, as did the trial court, that the Louisiana Sales-Use Tax is constitutional, and that this state's sales-use tax system operates uniformly to both interstate and intrastate transactions, in no way favoring the intrastate taxpayer over the interstate taxpayer. See Mouton v. Klatex, Inc., supra.

We, therefore, answer the stated questions as follows:

First, the proper tax base for the Collector to employ in collecting the Louisiana use tax is the "cost price" of the tangible personal property, including labor and shop overhead expenses and transportation expenses.

Secondly, the Louisiana use tax is constitutional, because it is non-discriminatory and meets the test of "equality."

In addition, there are two incidental questions which require an answer:

First, has the Collector's claim for additional use taxes prescribed?, and

Second, is the Collector entitled to recover on his claim for attorney's fees?

On the question of prescription, the taxpayer argues that the Collector's claim for an additional use tax based on the taxpayer's labor and shop overhead expenses in fabricating the steel plates in the taxpayer's out-of-state shops is barred by the three-year prescription provided in Article 19, Section 19, of the Louisiana Constitution of 1921.

That Article provides, in pertinent part, as follows:

> ". . . that all taxes and licenses, other than real property taxes, shall prescribe in three years from the 31st day of December in the year in which such taxes or licenses are due."

The sole purpose of this constitutional provision is "to deter the practice of bringing suits on stale

claims." See State v. Alden Mills, 202 La. 416, 12 So.2d 204 (1943), as cited in Collector v. Pioneer Bank and Trust Co., 250 La. 446, 196 So.2d 270, 273 (1967).

The Collector's claim in the instant case can not be classified as a "stale claim." The stipulated facts reveal that the Collector and the taxpayer entered into several certain agreements extending the prescriptive periods through March 31, 1964. Prior to the expiration of the latest of the suspended periods, the taxpayer filed this suit on March 20, 1964, for a refund of the taxes paid under protest. In this suit the Collector filed responsive pleadings, and then on August 8, 1967, filed a reconventional demand for additional use taxes.

In the case of Collector of Revenue v. J. L. Richardson Company, La. App., 247 So.2d 151 (4th Cir. 1971), the Court pointed out:

> "The primary purpose of prescriptive periods is to timely advise a person of his potential liability arising from an occurrence or transaction in which he was involved, as well as to put an end to his potential liability if no proceedings are filed within a reasonable period of time."

The taxpayer herein can not seriously consider that he was not timely advised of his potential liability. The several suspension agreements dealing with the question of the use tax liability of Chicago Bridge & Iron Company were for the mutual benefit of the taxpayer and the Collector, while they tried to resolve amicably a difficult tax question.

La. R.S. 47:1580 includes a provision for the suspension of prescription, as follows:

". . . The running of such prescription may also be suspended by means of a written agreement between the taxpayer and the collector made prior to the lapse of the prescriptive period set out in the Constitution of Louisiana."

Hence, we can only conclude that the running of prescription in the instant case was suspended by the agreement, filed as Exhibit 22, extending the prescriptive period through March 31, 1964.

On March 20, 1964 (prior to the running of the prescriptive period) the taxpayer elected to file its petition for a refund of the taxes paid under protest. By so filing this petition instituting this suit in the state district court, the taxpayer interrupted the running of prescription under the express provisions of La. R.S. 47:1580.

This Section states as follows:

"The prescription running against any state tax, license, excise, interest, penalty or other charge shall be interrupted by:

"(1) The collector's action in assessing any such amounts in the manner provided by law;
(2) The filing of a summary proceeding in court;
(3) The filing of any pleadings, either by the collector or by a taxpayer, with the board of appeals or any state or federal court; . . ."

This Section specifically states that the filing of any pleadings either by the collector or the taxpayer serves to interrupt prescription. We find that the trial court was correct in holding that the filing of the refund suit by the taxpayer effectively interrupted the

running of prescription as to the use tax during the taxable period herein. The case of Collector of Revenue v. Pioneer Bank and Trust Co., 250 La. 446, 196 So.2d 270 (1967), supports this position. In the Pioneer Bank case the Court overruled a plea of prescription where the three-year prescriptive period had been effectively interrupted by one of the applicable modes of interruption provided in Section 1580, *i.e.*, assessment of tax deficiency. In the instant case the mode of interruption was the filing of a pleading by the taxpayer with a state court. The law makes no distinction among the several modes of interruption as to their legal effectiveness in interrupting the running of prescription. Each mode of interruption accomplishes this purpose. Therefore, we agree with the trial court's overruling of the exception of prescription filed by the taxpayer in the instant suit.

Finally, we consider the question of whether the Collector is entitled to recover on his claim for attorney's fees. The trial court disallowed this claim for attorney's fees, considering that the applicable statute, La. R.S. 47:1512, classified such attorney's fees as a "penalty" which was not favored in the law. In justifying its denial of attorney's fees, the trial court relied upon the case of State v. Sinclair Refining Co., 195 La. 288, 196 So. 349 (1940), quoting in part, as follows:

> ". . . while it is true the payments were not made within the time prescribed by law, yet they were made, and the State received the entire amount due, and, so far as the record discloses, made no complaint and made no demand for the payment of penalties until the filing of this suit. This claim

> for penalties is stale. . . . This Court has repeatedly held that penalties in civil actions are not favored by the courts."

We are unable to agree with the trial court that the Sinclair case rejected the claim for attorney's fees. As shown by the case of Daspit v. Sinclair Refining Co., 198 La. 9, 3 So.2d 259 (1941), which is a follow-up to the Sinclair case, the judgment in the Sinclair case did provide for attorney's fees.

The applicable law on the question of attorney's fees in tax matters is found in La. R.S. 47:1512:

> "The collector is authorized to employ private counsel to assist in the collection of any taxes, penalties or interest due under this Sub-title, or to represent him in any proceeding under this Sub-title. If any taxes, penalties or interest due under this title are referred to an attorney at law for collection, an additional charge for attorney fees, in the amount of ten per centum (10%) of the taxes, penalties and interest due, shall be paid by the tax debtor."

In the recent case of Collector of Revenue vs. Gulf States Utilities Co., La. App., 289 So. 2d 367 (1st Cir. 1974), this Court allowed attorney fees in a summary proceeding brought pursuant to La. R.S. 47:1574:

> "The Collector is further entitled to recover attorney's fees in the amount of ten percent on the aggregate of principal unpaid taxes and interest due thereon, together with all costs of these proceedings."

Payment of a tax under protest in accordance to L.S.A. R.S. 47:1576, neither releases nor extinguishes

an obligation in favor of the state resulting from the finality of the assessment it merely provides a procedure for judicial review of the legality of the assessment from its inception and also the legality of the enforcement measures resorted to by the tax collector.

It is not a payment in full without question of the tax by the tax debtor nor a collection by the tax collector without strings attached to it. As a matter of fact the amount paid must be segregated and held by the collector pending the outcome of the suit. If the debtor prevails, the collector must refund the amount to the claimant, with interest at the rate of 2% per annum covering the period from the date said funds were received by the collector to the date of the refund. R.S. 47:1576 and Ortlieb Press, Inc. vs. Mouton, (La. 1st Cir. App. 1972), 268 So. 2d 85, writ refused.

There is no question but that when the collector of Revenue is met with a proceeding under R.S. 47:1576 or for the collection by suit of any other taxes, he is in dire need of private counsel and is authorized and empowered to employ private counsel to represent him in any proceeding to assist in the collection of any taxes, penalties or interest in accordance with R.S. 47:1512, quoted above.

The facts show that in the instant case the Collector employed private counsel to represent him to recover the additional taxes allegedly owed by the taxpayer, as well as to defend against the taxpayer's claim for a refund. Taxes and interest have been found to be due by the taxpayer in this suit. Consequently, the Collector is entitled to recover attorney's

fees in the amount of ten per centum (10%) on the entire amount of the judgment, including principal and interest and the amount paid by the taxpayer under protest. See Mouton vs. Klatax, Inc., La. App., 238 So. 2d1 (1st Cir. 1970); State vs. Harrison Wholesale Liquors, La. App., 80 So. 2d 546 (Orl. 1955); and State v. Menefee Motor Co., La. App., 139 So. 61 (Orl. 1932).

For the foregoing reasons, the judgment appealed from is amended insofar as it denied recovery to the Collector of attorney fees, and judgment is entered herein in favor of the Collector and against the taxpayer for attorney fees pursuant to La. R.S. 47:1512. In all other respects, the judgment appealed from is affirmed, all costs to be paid by the taxpayer.

JUDGMENT AMENDED AND AFFIRMED.

Rendered and filed in the records
on June 23, 1975

APPENDIX "3"

No. 55,769

Supreme Court of Louisiana

CHICAGO BRIDGE & IRON COMPANY

VERSUS

ROLAND COCREHAM, COLLECTOR OF REVENUE

On Writ of Review to the Court of Appeal,
First Circuit, Parish of East Baton Rouge

CALOGERO, Justice.

This is a tax refund suit which involves the validity and the application of the Louisiana Sales-Use Tax to the activities of plaintiff, Chicago Bridge & Iron Company (hereinafter referred to as CBI) in connection with major construction projects of the taxpayer in the State of Louisiana between December 1, 1955 and December 31, 1960.

Suit was filed in March, 1964 against the Collector of Revenue for the State of Louisiana for a refund of use taxes ($28,180.33) paid under protest for the taxable period and held in escrow by the Collector pursuant to R.S. 47:1576.

In these same proceedings in August of 1967, the Collector filed a reconventional demand claiming additional use taxes from CBI, for the same audit period, taxes in the sum of $63,309.23 which were not involved in the refund claimed in CBI's original petition.

CBI filed a peremptory exception of prescription to the Collector's reconventional demand as well as an answer denying the Collector's claim for additional use taxes.

Subsequently, the Collector amended his petition to claim attorneys' fees on all amounts, if any, that the court should find due by CBI to the Collector as a result of the controversy, including $28,180.33 dollars paid by CBI under protest and the object of the refund suit.

The trial judge rendered a judgment overruling the exception of prescription filed by CBI against the Collector's reconventional demand, denying CBI's claim for refund of the sum paid under protest, granting judgment to the Collector for the amount claimed in the Collector's reconventional demand and denying all claims of the Collector for attorneys' fees.

After motions for new trial of both parties were denied, both CBI and the Collector appealed.

The Court of Appeal affirmed the judgment of the district court in all respect except that the trial court's judgment denying attorneys' fees to the Collector was reversed, and the Collector allowed 10% attorneys' fees on both the amount of the reconventional demand and on the amount paid by CBI under protest. Chicago Bridge & Iron Company v. Cocreham, 303 So.2d 750 (La. App. 1st Cir. 1974).

We granted writs on application of CBI. Chicago Bridge & Iron Company v. Cocreham, 307 So.2d 633 (La. 1975).

The Court of Appeal described the activities of CBI which gave rise to the taxpayer's sales-use tax liability as follows:

> "During the taxable period the taxpayer, an Illinois corporation authorized to do and doing business in the State of Louisiana, was engaged in the business of constructing specialized steel plate structures, such as storage tanks, generally for municipalities and corporations. The structures built by the taxpayer consisted primarily of fabricated steel plates assembled by the taxpayer's employees on prepared foundations at the job site. Unfinished steel plates were purchased by the taxpayer from out-of-state suppliers, and carried to the taxpayer's out-of-state shops where the steel plates were fabricated with labor and overhead expenses paid by the taxpayer. After fabrication the steel plates were usually transported at the taxpayer's expense from its out-of-state shops by common carrier to Louisiana job sites." 303 So. 2d at 751.

The amount of sales-use tax liability of the taxpayer for the taxable period is the basic issue involved in these proceedings. CBI contends that Louisiana Use Tax is due based simply upon the purchase price paid for the unfinished steel plates to the out of state vendors. That sum has been paid and there is no dispute on this item. The Collector contends that the tax base for Louisiana Sales Use tax includes in addition to the purchase price paid for the unfinished steel plates, the element of labor and shop overhead expenses incurred by CBI in fabricating the steel plates in the taxpayer's out of state shops and the element of transportation ex-

penses (freight) paid by the taxpayer to transport the fabricated steel plates from its out of state shops to Louisiana job sites. The Collector acknowledges that expenses of labor and shop overhead at the construction site are not taxable and such expenses form no part of this litigation.

Accordingly, the two disputed elements in calculating the correct tax basis involved in these proceedings are 1) labor and shop overhead expenses, and 2) transportation expenses (freight).

The tax amounts applicable to these two elements (should they be found legally due) were stipulated at the trial.

It was the transportation expense in the sum of $28,180.33 which CBI paid under protest and made the subject of its refund suit. It was the element of labor and shop overhead expense in the sum of $63,309.23 which was made the subject of the Collector's reconventional demand.

The issues which we will hereinafter consider and resolve in the order in which we propose to consider them are the following: [1]

1. Does the correct tax basis for the sales-use tax for the taxable period properly include the element of labor and shop overhead expenses?
2. If the sales-use tax includes the element of

[1] We pretermit a decision on the merit of CBI's peremptory exception of prescription to the Collector's reconventional demand. A resolution of that issue is not necessary in light of the decision, reached herein, that the Collector is not entitled to recover the taxes which are the subject of his reconventional demand.

labor and shop overhead expenses, is the statute to that extent unconstitutional?

3. Does the correct tax basis for the sales-use tax for the taxable period properly include the element of transportation expenses?
4. If the sales-use tax includes the element of transportation expense, is the statute to that extent unconstitutional?

If the Collector is correct in one or both of his contentions with respect to the elements of the corrected tax basis of the Louisiana sales-use tax, whether the Collector is entitled to statutory attorneys' fees under the provision of R.S. 47:1512 with respect to either or both of such elements, is an additional issue which we must resolve.

LABOR AND SHOP OVERHEAD EXPENSES AND THE USE TAX

Are labor and shop overhead expenses includable elements of added value in determining the tax basis of the use tax as applied to the out of state manufacturer-user?

The Court of Appeal properly answered the foregoing question in the affirmative. They pointed out that R.S. 47:302 levies a tax upon the use of each item or article of tangible personal property (when the same is not sold within the State); that the measure of the use tax liability is 2% [2] of the "cost price" of each item

[2] We note that during the audit period in question the State sales tax rate was 2%. That rate today is 3%, because in 1970 the Legislature passed Act 256, incorporated into the Revised Statutes as R.S. 47:321, imposing an additional State sales tax of 1%.

or article of tangible personal property, R.S. 47:302 A (2); that "cost price" as defined in R.S. 47:301(3) means "the actual cost of the articles of tangible personal property *without any deductions therefrom on account of the cost of materials used, labor or service cost, transportation charges or any other expenses whatsoever*"; and that properly construed these statutes impose the use tax upon the cost price (or value) at the time the tangible property becomes a part of the mass of the property of the taxing state, including therein the "labor or service costs" (in effect, the labor and shop overhead expenses).

This conclusion of the Court of Appeal is supported by decisions of this Court.

> "These provisions [referring to R.S. 47:303 A], along with the others above mentioned, clearly indicate that the 'use' tax is to be computed on the retail price the property would have brought when imported—that is, its then value or worth." Fontenot v. S.E.W. Oil Corp., 232 La. 1011, 1018, 95 So.2d 638, 640 (1957).

See also this Court's opinion in Halliburton Oil Well Cementing Company v. Reily, 241 La. 67, 127 So.2d 502 (1961), reversed on other grounds, 373 U.S. 64, 83 S.Ct. 1201, 10 L. Ed. 2d 202 (1963).

CONSTITUTIONALITY OF USE TAX AS APPLIED TO LABOR AND SHOP OVERHEAD EXPENSES OF THE OUT OF STATE MANUFACTURER-USER.

CBI takes the position that the use tax as applied to the elements of labor and shop overhead (and trans-

portation expenses as well—this will be discussed hereinafter) is unenforceable because it is illegally discriminatory principally in violation of the protection guaranteed in Article I, §8, Cl. 3 (the commerce clause) of the United States Constitution.

As this is the central issue in this litigation it is well that we briefly review Louisiana's sales-use tax law and pertinent prior jurisprudence.

R.S. 47:302 provides for the imposition of a tax "at the rate of 2 per centum (2%) of the sales price of each item or article of tangible personal property when sold at retail in that state . . . ."

It imposes another tax "at the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is used . . . in this state . . . ." This latter tax is the use tax. It is reduced by the amount of a similar sales or use tax paid on the item in a different state. R.S. 47:305.

The purpose of the sales-use tax scheme is to make all tangible personal property used or consumed in the state subject to a uniform tax burden irrespective of whether it is acquired in the state, making it subject to the sales tax, or acquired from without the state, making it subject to the use tax at the same rate.

The United States Supreme Court in Henneford v. Silas Mason Co., 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814 (1937), held that the use tax, a "compensating tax" (inasmuch as it complements the sales tax), is not, as applied to chattels purchased in an-

other state and used in the taxing state thereafter, a violation of the commerce clause.[3]

The litigants herein accordingly concede the validity of the sales-use tax scheme.

CBI contends, however, that as applied to labor and shop overhead of the out of state manufacturer-user, the tax is discriminatory because it is not similarly imposed upon the in-state manufacturer-user.

If they are correct in their contention that the use tax does not bear against labor and shop overhead of the in-state manufacturer-user it is evident that the allegation of unconstitutionality is correct, for in *Halliburton, supra*, the United States Supreme Court held precisely that. In the *Halliburton* litigation this Court had earlier concluded that the proper comparison (in determining whether there is unconstitutional discrimination) should be between the use tax on the assembled equipment and the sales tax on the same equipment if it were sold. Based upon this comparison this Court had found the out of state manufacturer-user to be on the same tax footing with respect to the equipment used as his competitor who purchases (in-state) from the retailer, rather than manufacturing his own equipment. The United States Supreme Court, however, took the position that the proper comparison

[3] "When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident and the other upon another but the sum is the same when the reckoning is closed." Henneford v. Silas Mason Co., 300 U.S. at 584, 57 S.Ct. at 527, 81 L.Ed. at 819.

is between the out of state manufacturer-user and the in-state taxpayer most similarly situated, namely, the local manufacturer-user.

Finding discriminatory effect in this comparison (because CBI pays use tax on labor and shop overhead, while a local manufacturer-user pays neither sales nor use tax on labor and shop overhead) the United States Supreme Court in *Halliburton* concluded that the Louisiana Use Tax as thus applied was invalid as discriminating against interstate commerce in violation of the commerce clause. Equal treatment for in-state and out of state taxpayers similarly situated, it was said, is the condition precedent for a valid use tax on goods imported from out of state.

The United States Supreme Court in finding this unequal treatment had relied upon the following stipulation between the Collector of Revenue for the State of Louisiana and the taxpayer:

> "If Halliburton had purchased its materials, operated its shops, and incurred its Labor and Shop Overhead expenses at a location within the State of Louisiana, there would have been a sales tax due to the State of Louisiana upon the cost of materials purchased in Louisiana and a Use Tax on materials purchased outside of Louisiana; *but there would have been no Louisiana sales tax or use tax due upon the Labor and Shop Overhead.*" 373 U.S. at 67, 83 S.Ct. at 1202-03, 10 L.Ed.2d at 205. (Emphasis provided).

The import of Halliburton is best illustrated by Justice Brennan's comment, in his concurring opinion,

that "the Court holds no more than that if Louisiana chooses to levy such a use tax it cannot constitutionally exempt in-state manufacturer-users as it now does; it must tax 'the privilege of use' within the State of the property of such users at full value and at the same rate." 373 U.S. at 77-8, 83 S.Ct. at 1208, 10 L.Ed.2d at 211.

Perhaps prompted by this delimitation of the *Halliburton* holding, the Collector makes the following contention (one accepted as proven by the Court of Appeal): while the stipulation agreed upon by the Collector in the *Halliburton* case was on its facts applicable to the very audit period involved in this litigation and while the Collector in that case agreed that there would have been no Louisiana Sales Tax or Use Tax due upon labor and shop overhead by the in-state manufacturer-user during the given period, the Collector takes the position here that the stipulation to which he had agreed in the *Halliburton* litigation was simply erroneous.

He is, perhaps, entitled to make that allegation in this lawsuit. And if he is correct, it matters not that in an earlier separate lawsuit his counsel had mistakenly taken a position contrary to the present one as to the applicability and application of the sales-use tax under the statutes, regulations and collection policies of the Department of Revenue.

We must then determine from the record before us and the laws of the State of Louisiana whether or not during the audit period in question, in-state manufacturer-users were or were not required to pay

sales or use tax upon labor and shop overhead incurred at their in-state plant.

At the outset we must consider the activities of CBI and their in-state counterpart whose operations are being scrutinized in connection with the use tax. CBI's activity is that of a construction contractor. The company does not inventory prefabricated parts for interchangeable use and did not supply component parts to owners or contractors for construction by them.

We also know that a construction contractor is a consumer, a purchaser at retail who is subject to payment of sales tax, for

> "A contractor who buys building material is not one who buys and sells—a trader. He is not a 'dealer,'
>
> or one who habitually and constantly, as a business, deals in and sells any given commodity. He does not sell lime and cement and nails and lumber.
>
> "His undertaking is to deliver to his obligee some work or edifice or structure, the construction of which requires the application of skill and labor to these materials so that, when he finishes his task, the materials purchased are no longer to be distinguished, but something different has been wrought from their use and union. *The contractor has not resold but has consumed the materials. Sales to contractors are sales to consumers . . . .*" State v. J. Watts Kearny & Sons, 181 La. 554, 559, 160 So. 77, 78 (1935) (Emphasis provided).

See also State v. Owin, 191 La. 617, 186 So. 46

(1938) and Claiborne Sales Company, Inc. v. Collector of Revenue, 233 La. 1061, 99 So.2d 345 (1957).

With respect to such consumer the taxable incident in connection with the sales tax is the in-state purchase of materials by him.

The narrow question we are here considering is whether under Louisiana law the in-state purchaser who, in performing his construction contracts, in part fabricates or manufacturers off site at his in-state plant, is required to pay, in addition to the sales tax on the raw materials purchased in-state, a use tax on the labor and shop overhead which goes into fabrication of such equipment. In effect, has the Louisiana Legislature placed upon the cost of intra-state labor and shop overhead a use tax, in the nature of a value added tax?

The Collector says that the Legislature has done just that. In support of his contention he relies upon the provisions of R.S. 47:302, the regulations of the Collector of Revenue enacted or adopted pursuant to the authority of R.S. 47:1511, and the collection policies and procedures of the Department of Revenue during the audit period.

R.S. 47:302 does indeed levy a tax upon the use of each item or article of tangible personal property. The statute in distinguishing the use tax from the sales tax goes on to declare that the tax is at the rate of 2% of the cost price of each item or article of tangible personal property *when the thing is not sold* but is used in this state.

The statute does not precisely describe any use or value added tax upon the cost of intra-state labor and shop overhead. Nor does it clearly preclude the imposition of such a tax. At best for the Collector it might be said that the statute in this respect is unclear, or imprecise.

The general rule is that where a tax statute is susceptible of more than one reasonable interpretation, the construction favorable to the taxpayer is adopted. Brown v. LaNasa, 244 La. 314, 152 So.2d 33 (1963); United Gas Corp. v. Fontenot, 241 La. 564, 129 So.2d 776 (1961).

The Collector next directs our attention to several of the regulations of the Department of Revenue in effect during the audit period.[4] He suggests that a review of these Regulations will indicate that the Department policy during the audit period was to tax the in-state manufacturer-user on the cost of labor and shop overhead.

Our review of those regulations does not cause us to so conclude.

If anything, review of the regulations leaves us with the opposite conclusion. Article 2-3 and its history are particularly revealing. Prior to 1963, Article 2-3, concerning the use tax, made no reference what-

[4] The cited regulations of "Rules and Regulations Promulgated in connection with Louisiana General Sales Tax" issued by the Collector of Revenue on August 1, 1954 and January 1, 1958 are: Articles 2-2(a), 2-3, 2-5, 2-7, 2-8, 2-33, 2-37, 2-47, 2-49, 2-50 and question No. 7 of Questions and Answers.

ever to the imposition of the use tax upon labor and shop overhead of the in-state manufacturer-user. It provided as follows:

> "Article 2-3. USE TAX—The Louisiana General Sales Tax Act imposes a tax on the use, consumption, distribution and storage for use or consumption in this State, of tangible personal property purchased in such manner that the sales tax does not apply thereto.
>
> "The Use Tax applies to the use of property purchased in interstate commerce, or in other States for the purpose of use in this State after interstate commerce has ended. For purposes of taxation, interstate commerce ends when purchased property reaches the consignee, and comes to rest within the State. The tax does not attach until the property has come to rest in the State of Louisiana.
>
> "Generally, it may be said that the Use Tax applies to the use of property in this State, the sale of which would be subject to tax had there been a purchase within this State. The Use Tax does not apply upon the use of any property which has been subjected to a sales tax in another State at a rate equal to or greater than the rate of tax imposed by the Louisiana General Sales Tax Act, nor does the Use Tax apply upon the use of any property which is exempt from the tax imposed upon the sale at retail by the Louisiana General Sales Tax Act. *The two Taxes, Sales and Use stand as complements to each other and taken together provide a uniform tax upon either the sale at retail or use of all tangible personal property irrespective of where it may have been purchased.*

"The Use Tax is based on the 'cost price' of the tangible personal property. The 'cost price' means the actual cost of the property including transportation costs incurred in transporting the property to the place where it is to be used. No deduction is allowed for materials used, labor, service cost, transportation charges or any other expenses whatsoever."

After the decision in *Halliburton*, in which the United States Supreme Court declared unconstitutional Louisiana's Use Tax as applied to shop overhead and labor of the out of state manufacturer-user because they found based upon the stipulation no similar tax (sales or use) imposed upon the local competitor, namely, the in state manufacturer-user, the Collector thereupon amended article 2-3 effective August 1, 1963 so as to impose the use tax upon the in-state manufacturer-user. Article 2-3 was amended to read as follows:

"ARTICLE 2-3. USE TAX

"The Louisiana use tax is complementary to the Louisiana sales tax and applies in all cases where tangible personal property is not sold at retail but is used or consumed in Louisiana or stored for use or consumption in Louisiana. *Thus, the Louisiana use tax applies not only to property imported for use or consumption in Louisiana or stored for use or consumption in Louisiana but also to property manufactured in Louisiana and used or consumed in Louisiana or stored for use or consumption in Louisiana by the manufacturer.*

"The basis for computing the use tax is the

'cost price' of the article subject to the tax. 'Cost price' is the fair market value of the property at the time it becomes subject to Louisiana tax jurisdiction. *For new items fair market value is the price paid by the Louisiana user—including cost of materials, labor, shop overhead and transportation.* For items which have been imported which have not been newly acquired by the user, fair market value is the price established in the Louisiana secondhand market for similar items. When no such market exists, the fair market value is determined by allowing a deduction for reasonable depreciation on the new cost plus cost of improvements.

". . . ."

The Collector's changing Article 2-3, or "clarifying" it as he contends, in the foregoing specifics, would not standing alone cause us to conclude that during the subject audit period (prior to the 1963 amendment to Article 2-3) there was no applicable use tax imposed upon the in-state manufacturer-user. However, coupled with the provisions of the statute and the Halliburton stipulation it seems perfectly clear to us that this was the case. Certainly some effect must be attributed to the fact that the Collector of Revenue in that litigation, speaking of the period which is involved in the subject audit, declared rather solemnly on a point which ultimately governed the outcome of that litigation, that had the taxpayer "purchased his material, operated his fabricating shops and incurred his labor and shop overhead expenses . . . at a location within the State of Louisiana,

. . . there would have been no Louisiana sales tax or use tax due upon the labor and shop overhead."

The Collector attempts to offset the import of the *Halliburton* stipulation, the amendment to the Regulations in 1963 (Article 2-3) and the lack of clarity and precision of R.S. 47:302 (to be most generous with the Collector's position) by relying upon the testimony of witnesses at trial concerning the Department's policy during the subject audit period and the circumstances surrounding execution of the "erroneous" *Halliburton* stipulation.

That testimony was less than conclusive. In fact in some instances it supports CBI's rather than the Collector's position. In any event taxes are imposed by the Legislature, not by the Department of Revenue.

We conclude that pertinent to this case the use tax did not bear against labor and shop overhead of the in-state manufacturer-user, just as was stipulated to have been the case in *Halliburton.*

R.S. 47:302, to the extent that it imposes a use tax complementing the sales tax, was designed to, and in fact did, impose a tax upon tangible personal property not purchased within the State but rather imported and used therein. Furthermore it does not place a use tax, or value added tax, upon the cost of intrastate labor and shop overhead.

Finding that the use tax is imposed upon labor and shop overhead of the out of state manufacturer-user and that neither sales nor use tax is imposed upon the in-state manufacturer-user, we are con-

strained by the United States Supreme Court decision in *Halliburton*, to conclude that the Louisiana Use Tax as applied to labor and shop overhead of the out of state manufacturer-user is unconstitutional and therefore unenforceable, because violative of the commerce clause of the United States Constitution.

TRANSPORTATION EXPENSE AND THE USE TAX

Are transportation expenses (freight) an includable element of added value in determining the tax basis of the use tax as applied to the out of state manufacturer-user?

Both lower courts answered this question in the affirmative. They determined that the Collector could properly include in CBI's use tax basis the cost to CBI of transporting the fabricated steel components by rail carrier from its out of state shop to job sites located in Louisiana. They relied specifically upon Mouton v. Klatex, Inc., 238 So.2d 1 (La. App. 1st Cir. 1970), a decision which permitted the inclusion in the use tax basis, of transportation expenses incurred by the taxpayer on goods purchased in Arkansas and shipped into Louisiana by common carrier for the account of the purchaser.

Mouton v. Klatex was, of course, correct, as was the Court of Appeal below, in holding the use tax by its terms applicable to such transportation expenses (freight). The identical reasons supporting this interpretation are discussed more fully hereinabove in discussion of the labor and shop overhead expenses and the literal application of the use tax. The statute

defines cost price as "the actual cost of articles of tangible personal property without any deductions therefrom on account of the cost of materials used, labor or service cost, *transportation charges* or any other charges whatsoever."

CONSTITUTIONALITY OF USE TAX AS APPLIED TO TRANSPORTATION EXPENSES OF THE OUT OF STATE MANUFACTURER-USER

Having found that transportation cost is an includable element (added value) in determining the use tax basis as applied to the out of state manufacturer-user, we turn now to the question of whether the tax as so applied is unenforceable because illegally discriminatory in violation of the protection guaranteed by the commerce clause of the United States Constitution.

Neither the sales nor use tax is imposed upon the in-state manufacturer-user for comparable transportation costs. R.S. 47:302(A)(1); 47:301(13). See also Art. 2-7 of the Regulations of the Department of Revenue which asserts that the purchaser has no sales tax liability where "the services rendered by the railway company or other transporting agency are rendered to . . . the purchaser."

CBI's position with respect to this discriminatory application is basically the same as is urged with respect to the labor and shop overhead aspect of the case. They contend that the out of state manufacturer-user who at his own expense contracts for shipment to an in-state job site pays the use tax on the "cost" element

attributable to transportation, while his competitor who purchases raw materials in-state, contracts for shipment to his in-state plant, then contracts for shipment of fabricated items to job site, pays no sales or use tax upon either such element of transportation costs.

The Collector's argument is essentially that transportation charges are *effectively* included within the sales price of the in-state sale at retail, for that price includes transportation charges required to bring the item to the Louisiana retailer. Furthermore, he contends that the net economic consequence incident to the element of transportation is dictated by the purchaser's choice of supply rather than whether state boundaries are crossed.[5]

While CBI is complaining of use tax applying to the cost of transporting items fabricated at their out of state plant to in-state job sites, the Collector's argu-

[5] The Collector points out that hypothetically there can be a circumstance where a customer who purchases from a near-by, but out of state, vendor may pay less in use tax, than another customer, who purchases from the same vendor's outlet which happens to be in-state but more distant, will pay in sales tax (the sales tax on a price of the in-state purchase which includes a greater transportation cost). For example, at Biloxi, Mississippi manufacturer of refrigerators might have two outlets, one in Biloxi and one in Monroe. A New Orleans customer buying from the Biloxi outlet would be required to pay a use tax on the cost of transporting the refrigerator from Biloxi to New Orleans. A second New Orleans customer, buying his refrigerator from the Monroe outlet (and contracting his own common carrier shipment to New Orleans) would be required to pay a sales tax on the purchase price, part of which would likely represent the

ment focuses upon inclusion of prior transportation cost in the retail sales price in the in-state purchase situation. While the two situations are dissimilar, the Collector's argument, to the extent that it may have merit, is sufficiently analogous. We therefore consider hereinafter the treatment of transportation cost and the comparison between the in-state purchaser's retail sales price (sales tax) and the out of state purchaser's "cost" (use tax).

The Collector's argument that transportation cost included as a part of the retail price in the sales tax situation is the counterpart of the transportation cost taxable to the out of state purchaser as an element of the use tax, has merit only if we consider items which originate out of state and even then it does not account for the disparity in treatment with respect to in-state retailer shop to in-state plant portion of the shipment (recall that in the use tax situation all transportation costs to the consignee's depot or place of first use within the state are taxable as part of the use tax, while the in-state purchaser may avoid payment of sales tax on the portion of the shipment from the re-

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freight charge for transportation from Biloxi to Monroe. As the cost of Biloxi-New Orleans transportation would be less than the cost of Biloxi-Monroe transportation, the use tax, chargeable to the out of state purchaser, would be less in this special situation than the sales tax chargeable to the in-state purchaser. This argument, while interesting and based upon a possible but unlikely set of hypothetical facts, does not disprove the very real discrimination suffered by CBI by comparison with its counterpart in-state manufacturer-user, relative to sales-use tax and transportation cost, which is discussed more fully elsewhere in this opinion.

tail shop to in-state plant or job site by providing his own transportation or contracting himself with the common carrier).

There is no merit to the Collector's argument that CBI pays no more tax, sales and/or use, on the transportation cost of materials purchased out of state and delivered in-state than does his Louisiana competitor purchasing locally who pays sales tax on the retail price of purchased goods. There is a fallacy in this comparison which is pointed up (analogously) in the United States Supreme Court's decision in *Halliburton*. The proper comparison of CBI's position is not with the purchaser from the nearby retailer whose retail sales price perhaps includes prior transportation costs but with the in-state competitor of CBI who contracts for his own transportation of in-state purchased material from retailer's shop to plant (and as more properly analogous to CBI's situation in this case, fabricated items from in-state plant to job site).

Considered in this perspective discrimination is evident since the out of state purchaser pays use tax fully on the element of transportation cost from state boundary to job site (or plant) while the in-state purchaser pays no tax (sales or use) on transportation cost from in-state retail shop to plant (and/or job site).

In the present case the Collector is demanding $28,180.33 in use tax charges on inter-state transportation costs that he would not be demanding if the transportation costs were incurred in intra-state transportation (assuming of course that retailer purchaser has independently contracted for shipment from retail

shop). Nor would he, in the intrastate situation, be indirectly realizing sales tax (by inclusion in the retail sales price of transportation charges for shipment *to* the in-state retailer) on the transportation costs from in-state retailer to in-state shop and from in-state shop to job site.

While *Halliburton* did not concern the transportation cost element of the Louisiana Use Tax, the holding there by the United States Supreme Court is just as applicable to transportation costs as to the labor and shop overhead expense, which issue was before them. That court stated

> "The conclusion is inescapable: equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state." 373 U.S. at 70, 83 S.Ct. at 1204, 10 L. Ed. 2d at 207.

The Collector relies principally upon Mouton v. Klatex, *supra*, wherein writs were denied by this Court, 256 La. 873, 239 So.2d 365 (1970), and as to which appeal was dismissed by the Supreme Court of the United States, 401 U.S. 968, 91 S.Ct. 1192, 28 L. Ed. 2d 318 (1971), in each instance without opinion.

The principal holding in *Mouton* was that Louisiana use tax does include transportation costs in its basis. The decision only made passing reference to the fact that such imposition is constitutional.[6] There was

[6] "We are also satisfied that under the Henneford decision, Louisiana may constitutionally so include transportation charges in the cost price or tax basis for imposition of the use tax." 238 S.2d at 3.

no further discussion of the matter, and it was not clear from the opinion that dissimilar treatment was afforded transportation costs under the Louisiana sales tax (relative to the in-state purchaser). We do not consider that decision controlling or persuasive. Nor do we find helpful the case of Colonial Pipeline Company v. Clayton, 275 N.C.215, 166 S.E.2d 671 (1969) cited by the Collector, because the same inappropriate comparison which the Collector argues in this case was made by the North Carolina Supreme Court there when they noted in distinguishing *Halliburton* that in the sales tax situation, transportation charges are necessarily a part of the price a retailer pays (and/or charges) for his goods.

We conclude that insofar as the use tax is imposed upon the element of transportation cost for shipping CBI's fabricated component parts from out of state plant to in-state job site, it is unconstitutional and unenforceable because it is in violation of the commerce clause of the United States Constitution.

Henneford v. Silas Mason Co., 300 U.S. 577, 57 S.Ct. 527, 91 L. Ed. 814 (1937) did indeed mention that the State of Washington use tax statute incorporated in the use tax basis cost of transportation (presumably transportation from out of state retail outlet to in-state point of first use). And, of course, *Henneford* held the statute there under consideration to be constitutional. However, the opinion in *Henneford* was devoted exclusively to the validity of the use tax in its overall application. It did not specifically discuss the aspect of transportation cost inclusion in the use tax basis, nor did it assert whether the State of Washington excluded comparable transportation cost from its sales tax basis, nor did it focus upon an allegation of discrimination in this respect.

Because we have ruled favorably in connection with the taxpayer's contentions with respect to the transportation element of the use tax basis (the subject of CBI's tax refund claim) and in connection with the labor and shop overhead element of the use tax basis (the subject of the Collector's reconventional demand), we need not consider the issue relating to the statutory attorneys' fees, as to which there was partial disagreement by the two lower courts in this litigation.

For the foregoing reasons the judgment of the Court of Appeal is reversed, the reconventional demand of the Collector of Revenue demanding additional use tax is dismissed with prejudice, and there is judgment entered herein in favor of Chicago Bridge & Iron Co. and against the Collector of Revenue of the State of Louisiana decreeing them to be entitled to refund of taxes earlier paid in the amount of $28,180.33 with interest thereon at the rate of 2% per annum from March 4, 1964 until paid and for such costs as may otherwise be legally recoverable.

APPENDIX "4"

Supreme Court of the United States

NEW ORLEANS, 70112

For Immediate News Release

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 5th day of September, 1975, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

REHEARINGS GRANTED:

55,586 State v. Liesk

55,904 State v. Bryant

REHEARINGS REFUSED:

55,769 Chicago Bridge & Iron Co. v. Cocreham, etc.
SANDERS, C.J., BARHAM & DIXON, J.J., are of the opinion that a rehearing should be granted.

55,765 Teachers Retirement System, etc. v. Vial, et al

55,981 State v. McKinnon

54,608 State v. Babin (On Rehearing)
SANDERS, C.J., SUMMERS & MARCUS, J.J., are of the opinion that a rehearing should be granted.

56,054 State v. Sonnier

APPENDIX "5"

Louisiana Revised Statutes of 1950

As Amended*

Title 47, Chapter 2

Sales-Use Tax

Sec.

301. Definitions.
302. Imposition of tax.
303. Collection.
304. Treatment of tax by dealer.
305. Exclusions and exemptions from the tax.
305.1 Exclusions and exemptions; ships and ships' supplies.
305.3 Exclusions and exemptions; seeds used in planting of crops.
305.4 Exclusions and exemptions; casing, drill pipe and tubing used in offshore drilling.
305.5 Exclusions and exemptions; materials and supplies used in the construction of the Toledo Bend Dam Project.
305.6 Exclusions and exemptions; Little Theater tickets.
305.7 Exclusions and exemptions; tickets to musical performances of non-profit musical organizations.
305.8 Exclusions and exemptions; pesticides used for agricultural purposes.
305.9 Exclusions and exemptions; motion picture film rental.
305.10 Exclusions and exemptions; property purchased for use outside the state.
306. Returns and payment of tax; penalty for absorption of tax.
306.1 Collection from interstate and foreign transportation dealers.
307. Collector's authority to determine the tax in certain cases.
308. Termination or transfer of business.
309. Dealers required to keep records.
310. Wholesalers and jobbers required to keep records.
311. Collector's authority to examine records of transportation companies.

*Applicable during tax period involved herein

312. Failure to pay tax on imported tangible personal property; grounds for attachment.
313. System of import permits; seizure and forfeiture of vehicles used in importing without permit.
314. Failure to pay tax; rule to cease business.
315. Sales returned to dealer; credit or refund of tax.
316. Collector to provide forms.
317. Cost of collection.
318. Disposition of collections.

§ 301. Definitions

As used in this Chapter, the following words, terms and phrases have the meaning ascribed to them in this Section, except when the context clearly indicates a different meaning:

(1) "Business" includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect. The term "business" shall not be construed to include the occasional and isolated sales by a person who does not hold himself out as engaged in business.

(2) "Collector" means the Collector of Revenue for the State of Louisiana and includes his duly authorized assistants.

(3) "Cost price" means the actual cost of the articles of tangible personal property without any deductions therefrom on account of the cost of materials used, labor or service cost, transportation charges or any other expenses whatsoever; or the reasonable market value of the tangible personal property at the time it becomes susceptible to the use tax; whichever is less.

(4) "Dealer" includes every person who manufactures or produces tangible personal property for sale at retail, for use, or consumption, or distribution or for storage to be used or consumed in this state.

"Dealer" is further defined to mean:

(a) every person, who imports, or causes to be imported, tangible personal property from any state or foreign country for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in this state;

(b) every person who sells at retail, or who offers for sale at retail, or who has in his possession for sale at retail, or for use, or consumption, or distribution, or storage to be used or consumed in this state, tangible personal property as defined herein;

(c) any person who has sold at retail, or used, or consumed, or distributed, or stored for use or consumption in this state, tangible personal property and who cannot prove that the tax levied by this Chapter has been paid on the sale at retail, the use, the consumption, the distribution, or the storage of said tangible personal property;

(d) any person who leases or rents tangible personal property for a consideration, permitting the use or possession of the said property without transferring title thereto;

(e) any person who is the lessee or rentee of tangible personal property and who pays to the owner of such property a consideration for the use or possession of such property without acquiring title thereto;

(f) any person, who sells or furnishes any of the services subject to tax under this Chapter;

(g) any person, as used in this act, who purchases or receives any of the services subject to tax under this Chapter;

(h) any person engaging in business in this state. "Engaging in business in this state" means and includes any of the following methods of transacting business: maintaining directly, indirectly, or through a subsidiary, an office, distribution house, sales house, warehouse or other place of business or by having an agent, salesman or solicitor operating within the state under the authority of the seller or its subsidiary irrespective of whether such place of business, agent, salesman or solicitor is located in this state permanently or temporarily or whether such seller or subsidiary is qualified to do business in this state.

(5) "Gross sales" means the sum total of all retail sales of tangible personal property, without any deduction whatsoever of any kind or character except as provided in this Chapter.

(6) "Hotel" means and includes any establishment engaged in the business of furnishing sleeping rooms primarily to transient guests where such establishment consists of ten or more guest rooms under a single roof.

(7) "Lease or rental" means the leasing or renting of tangible personal property and the possession or use thereof by the lessee or rentee, for a consideration, without transfer of the title of such property.

The term "lease or rental", however, as herein defined, shall not mean or include the lease or rental made for the purposes of re-lease or re-rental of casing tools and pipe, drill pipe, tubing, compressors, tanks, pumps, power units, other drilling or related equipment used in connection with the operating, drilling, completion or reworking of oil, gas, sulphur or other mineral wells.

(8) "Person" includes any individual, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, this state, any parish, city and parish, municipality, district or other political subdivision thereof or any board, agency, instrumentality or other group or combination acting as a unit, and the plural as well as the singular number.

(9) "Purchaser" means and includes any person who acquires or receives any tangible personal property, or the privilege of using any tangible personal property, or receives any services pursuant to a transaction subject to tax under this Chapter.

(10) "Retail sale," or "sale at retail," means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property, and shall mean and include all such transactions as the collector, upon investigation, finds to be in lieu of sales; provided that sales for resale must be made in strict compliance with the rules and regulations. Any dealer making a sale for resale, which is not in strict compliance with the rules and regulations, shall himself be liable for and pay the tax.

The term "sale at retail" does not include sales of materials for further processing into articles of tangible personal property for sale at retail, nor does it include an isolated or occasional sale of tangible personal property by a person not engaged in such business.

(11) "Retailer" means and includes every person engaged in the business of making sales at retail or for distribution, or use or consumption, or storage to be used or consumed in this state.

(12) "Sale" means any transfer of title or possession, or both, exchange, barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property, for a consideration, and includes the fabrication of tangible personal property for consumers who furnish, either directly or indirectly, the materials used in fabrication work, and the furnishing, preparing or serving, for a consideration, of any tangible personal property, consumed on the premises of the person furnishing, preparing or serving such tangible personal property. A transaction whereby the possession of property is transferred but the seller retains title as security for the payment of the price shall be deemed a sale.

(13) "Sales price" means the total amount for which tangible personal property is sold, including any services, except services for financing, that are a part of the sale valued in money, whether paid in money or otherwise, and includes the cost of materials used, labor or service costs, except costs for financing which shall not exceed the legal interest rate and a service

charge not to exceed 6% of the amount financed, and losses; provided that cash discounts allowed and taken on sales shall not be included, nor shall the sales price include the amount charged for labor or services rendered in installing, applying, remodeling or repairing property sold.

(14) "Sales of services" means and includes the following:

(a) the furnishing of rooms by hotels, and tourist camps;

(b) the sale of admissions to places of amusement, to athletic entertainment other than that of schools, colleges and universities, and recreational events, and the furnishing, for dues, fees, or other consideration, of the privilege of access to clubs or the privilege of having access to or the use of amusement, entertainment, athletic or recreational facilities;

(c) the furnishing of storage or parking privileges by auto hotels and parking lots;

(d) the furnishing of printing or overprinting, lithographic, multilith, blue printing, photostating or other similar services of reproducing written or graphic matter:

(e) the furnishing of laundry, cleaning, pressing and dyeing services, including by way of extension and not of limitation, the cleaning and renovation of clothing, furs, furniture, carpets and rugs, and the furnishing of storage space for clothing, furs and rugs.

(f) the furnishing of cold storage space and the

furnishing of the service of preparing tangible personal property for cold storage, where such services is incidental to the operation of storage facilities; and

(g) the furnishing of repairs to tangible personal property, including by way of illustration and not of limitation, the repair and servicing of automobiles and other vehicles, electrical and mechanical appliances and equipment, watches, jewelry, refrigerators, radios, shoes, and office appliances and equipment.

(15) "Storage" means and includes any keeping or retention in this state of tangible personal property for use or consumption in this state or for any purpose other than for sale at retail in the regular course of business.

(16) "Tangible personal property" means and includes personal property which may be seen, weighed, measured, felt or touched, or is in any other manner perceptible to the senses. The term "tangible personal property" shall not include stocks, bonds, notes, or other obligations or securities.

(17) "Tourist camps" means and includes any establishment engaged in the business of furnishing rooms, cottages or cabins to tourists or other transient guests, where the number of guest rooms, cottages, or cabins at a single location is six or more.

(18) "Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business.

(19) "Use tax" includes the use, the consumption, the distribution and the storage, as herein defined. Amended by Acts 1954, No. 143, § 1; Acts 1954, No. 290, § 1; Acts 1966, No. 124, § 1; Acts 1966, No. 187, § 1.

§ 302. Imposition of tax

A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:

(1) At the rate of two per centum (2%) of the sales price of each item or article of tangible personal property when sold at retail in this state; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every retail sale.

(2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax.

B. There is hereby levied a tax upon the lease or rental within this state of each item or article of tangible personal property, as defined herein; the levy of said tax to be as follows:

(1) At the rate of two per centum (2%) of the gross proceeds derived from the lease or rental of tangible personal property, as defined herein, where

the lease or rental of such property is an established business, or part of an established business, or the same is incidental or germane to the said business.

(2) At the rate of two per centum (2%) of the monthly lease or rental price paid by lessee or rentee, or contracted or agreed to be paid by lessee or rentee to the owner of the tangible personal property.

C. There is hereby levied a tax upon all sales of services, as herein defined, in this State, at the rate of two per centum (2%) of the amounts paid or charged for such services.

The tax levied in this Section shall be collected from the dealer, as defined herein, shall be paid at the time and in the manner hereinafter provided, and shall be, in addition to all other taxes, whether levied in the form of excise, license, or privilege taxes, and shall be in addition to taxes levied under the provisions of Chapter 3 of Subtitle II of this Title.

D. Sales or use tax paid to this state on new motor trucks and new motor tractors licensed and registered for 12,000 pounds or more under the provisions of R.S. 47:462, new trailers and new semi-trailers licensed and registered for 16,000 pounds or more under the provisions of R.S. 47:462 for rental may be deducted as a credit on the tax due on the rental of each item of said property so that no tax is payable on rental income until the tax paid on the purchase price has been exceeded. Sales tax paid to another state on the purchase price of such trucks, tractors, trailers and semi-trailers is not deductible

from the tax subsequently due on the rental of such property in this state.

If the tax on rental income fails to exceed the credit for sales or use tax paid, no refund is due the purchaser.

Any sales tax paid on any maintenance or operation expense of a rental business is not deductible as a credit against the tax due on a rental income; such expenses are part of the cost of doing business and do not constitute a part of the identical property being rented. Added by Acts 1962, No. 172, § 1. Amended by Acts 1968, Ex.Sess., No. 5, § 1.

§ 303. Collection

A. **Collection from dealer.** The tax imposed under R.S. 47:302 shall be collectible from all persons, as hereinafter defined, engaged as dealers, as hereinafter defined.

On all tangible personal property imported, or caused to be imported, from other states or foreign countries, and used by him, the "dealer," as hereinafter defined, shall pay the tax imposed by this Chapter on all articles of tangible personal property so imported and used, the same as if the said articles had been sold at retail for use or consumption in this state. For the purposes of this Chapter, the use, or consumption, or distribution, or storage to be used or consumed in this state of tangible personal property, shall each be equivalent to a sale at retail, and the tax shall

thereupon immediately levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event.

A credit against the use tax imposed by this Chapter shall be granted to taxpayers who have paid a similar tax upon the sale or use of the same tangible personal property in another state. The credit provided herein shall be granted only in the case where the state to which a similar tax has been paid grants a similar credit as provided herein, provided that members of the armed forces who are citizens of this state and whose orders or enlistment contracts stipulate a period of active duty of two years or more and who purchase automobiles outside of the state of Louisiana while on such tour of active duty shall be granted such credit in connection with the purchase of such automobiles whether or not the state to which such tax thereon has been paid grants a similar credit as herein provided. The proof of payment of a similar tax to another state shall be made according to rules and regulations promulgated by the collector of revenue. In no event shall the credit be greater than the tax imposed by Louisiana upon the particular tangible personal property which is the subject of the Louisiana use tax.

B. **Collection of tax on vehicles.** The tax imposed by R.S. 47:302A on the sale or use of any motor vehicle, automobile, motorcycle, truck, truck-tractor, trailer, semi-trailer, motor bus, house trailer, or any

other vehicle subject to the vehicle registration license tax shall be collected as provided in this subsection.

1. The tax levied by R.S. 47:302A on any such vehicle shall be paid to the collector of revenue at the time of application for a certificate of title or vehicle registration license and no certificate of title or vehicle registration license shall be issued until the tax has been paid.

(a) The tax levied by R.S. 47:302A(1) on the sale of any such vehicle shall be due at the time registration or any transfer of registration is required by the Vehicle Registration License Tax Law (R.S. 47:451 et seq.).

(b) The tax levied by R.S. 47:302A(2) on the use of any such vehicle in this state shall be due at the time first registration in this state is required by the Vehicle Registration License Tax Law (R.S. 47:451 et seq.).

2. Every vendor of such a vehicle shall furnish to the purchaser at the time of sale a sworn statement showing the serial number, motor number, type, year, and model of the vehicle sold, the total sales price, any allowance for and a description of any vehicle taken in trade, and the total cash difference paid or to be paid by the purchaser between the vehicles purchased and traded in and the sales or use tax to be paid, along with such other information as the collector may by regulation require. All labor, parts, accessories, and other equipment which are attached to the vehicle at the time of sale and which

are included in the sale price are to be considered a part of the vehicle.

3. It is not the intention of this Subsection to grant an exemption from the tax levied by R.S. 47:302 to any sale, use, item or transaction which has heretofore been taxable and this Subsection is not to be construed as so doing. It is the intention of this Subsection to transfer the collection of the sales and use tax on vehicles from the vendor to the collector of revenue and to provide a method of collection of the tax directly from vendee or user by the collector of revenue. The collector of revenue and the governing body of any parish or municipality, or the school board of any parish or municipality, in which a sales or use tax has been imposed by such governing body or school board on the sale or use of motor vehicles, are authorized to enter into an agreement by which the collector of revenue may collect said tax on behalf of said parish or municipality or said school board. The collector shall withhold from any such taxes collected for parishes and municipalities and school boards one per cent of the proceeds of such tax so collected, which shall be used by the collector to pay the cost of collecting and remitting the tax to the parishes, municipalities and school boards.

4. The provision contained in R.S. 47:301(10) in the second unnumbered paragraph which excludes isolated or occasional sales from the definition of a sale at retail is not to apply to the sale of vehicles which are the subject of this subsection. Isolated or

occasional sales of vehicles are hereby defined to be sales at retail and as such are subject to the tax.
Amended by Acts 1962, No. 182; Acts 1964, No. 171, § 1; Acts 1964, No. 519, § 1; Acts 1964, Ex.Sess., No. 7, § 1; Acts 1965, No. 122, § 1; Acts 1966, No. 271, § 1.

§ 304. Treatment of tax by dealer

The tax levied in this Chapter shall be collected by the dealer from the purchaser or consumer, except as provided for the collection of the tax on motor vehicles in R.S. 47:303, as amended.

Every dealer located outside the state making sales of tangible personal property for distribution, storage, use, or other consumption, in this state, shall at the time of making sales collect the tax imposed by this Chapter from the purchaser.

Dealers shall, as far as practicable, add the amount of the tax imposed under this Chapter in conformity with the schedule or schedules to be prescribed by the collector pursuant to authority conferred herein, to the sale price or charge, which shall be a debt from the purchaser or consumer to the dealer, until paid, and shall be recoverable at law in the same manner as other debts. Any dealer who neglects, fails or refuses to collect the tax herein provided, shall be liable for and pay the tax himself.

Where the tax collected for any period is in excess of two per centum (2%), the total tax collected must be paid over to the collector of revenue, less the compensation to be allowed the dealer as hereinafter

set forth. This provision shall be construed with other provisions of this Chapter and given effect so as to result in the payment to the collector of revenue of the total tax collected if in excess of two per centum (2%).

Any dealer who fails, neglects, or refuses to collect the tax herein provided, either by himself or through his agents or employees, shall, in addition to the penalty of being liable for and paying the tax himself, be fined not more than one hundred dollars, or imprisoned for not more than three months, or both.

No dealer shall advertise or hold out to the public, in any manner, directly or indirectly, that he will absorb all or part of the tax or that he will relieve the purchaser from the payment of all or any part of the tax. Whoever violates this provision with respect to advertising shall be fined not less than twenty-five dollars nor more than two hundred fifty dollars, or imprisoned for not more than three months, or both. For a second or subsequent offense, the penalty shall be double.

The dealer or seller is permitted and required to state and collect the tax separately from the price paid by the purchaser.

The use of tokens is forbidden. The collector shall by regulations prescribe the method and the schedule of the amounts to be collected from the purchasers, lessees or consumers in respect to any receipt upon which a tax is imposed by this Chapter so as to eliminate fractions of one cent and so that the aggregate

collections of taxes by a dealer shall, as far as practicable, equal two per centum of the total receipts from the sales, leases, and services of such dealer upon which a tax is imposed. The schedules may provide that no tax need be collected from the purchaser, lessee or consumer upon receipts below a stated sum and may be amended from time to time so as to accomplish the purposes herein set forth.

In the event any political subdivision of this state is authorized to levy and levies a sales tax, the collector of revenue, in his discretion, may provide methods or schedules to accomplish the integration of the collection of the state and local taxes. Separate integrated bracket schedules may be provided for different kinds of transactions where all such transactions are not subject to both the state and the local tax. Amended by Acts 1962, No. 182, § 2.

§ 305. Exclusions and exemptions from the tax

(1) The gross proceeds derived from the sale in this state of livestock, poultry and other farm products direct from the farm are exempted from the tax levied by this Chapter, provided that such sales are made directly by the producers. When sales of livestock, poultry and other farm products are made to consumers by any person other than producer, they are not exempted from the tax imposed by this Chapter; but every agricultural commodity sold by any person, other than a producer, to any other person who purchases not for direct consumption but for the purpose of acquiring raw product for use or for sale in the process

of preparing, finishing or manufacturing such agricultural commodity for the ultimate retail consumer trade, shall be exempted from any and all provisions of this Chapter, including payment of the tax applicable to the sale, storage use, transfer, or any other utilization of or handling thereof, except when such agricultural commodity is actually sold as a marketable or finished product to the ultimate consumer, and in no case shall more than one tax be exacted. For the purposes of this Section, "agricultural commodity," means horticultural, viticultural, poultry, farm and range products, and livestock and livestock products.

(2) The "use tax," as defined herein, shall not apply to livestock and livestock products, to poultry and poultry products, to farm, range and agricultural products when produced by the farmer and used by him and members of his family.

(3) Where a part of the purchase price is represented by an article traded in, the sales tax is payable on the total purchase price less the market value of the article traded in.

(4) The sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this Chapter: Gasoline; steam; water (not including mineral water or carbonated water or any water put up in bottles, jugs, or containers, all of which are not exempted); electric power or energy; newspapers; fertilizer and containers used for farm prod-

ucts when sold directly to the farmer; and natural gas; new automobiles withdrawn from stock by factory authorized new automobile dealers, with the approval of the Collector of Revenue and titled in the dealer's name for use as demonstrators.

(5) It is not the intention of this Chapter to levy a tax upon articles of tangible personal property imported into this state, or produced or manufactured in this state, for export; nor is it the intention of this Chapter to levy a tax on bona fide interstate commerce. It is, however, the intention of this Chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state.

(6) Repealed. Acts 1964, No. 171, § 2.
Amended by Acts 1962, No. 182, § 3.

§ 305.1 Exclusions and exemptions; ship and ships' supplies

A. The tax imposed by R.S. 47:302(A) (1) shall not apply to sales of materials, equipment and machinery which enter into and become component parts of ships, vessels, including commercial fishing vessels, or barges, of fifty tons load displacement and over, built in Louisiana nor to the gross proceeds from the sale of such ships, vessels, or barges when sold by the builder thereof.

B. The taxes imposed by R.S. 47:302 shall not apply to materials and supplies purchased by the

owners or operators of ships or vessels operating exclusively in foreign or interstate coastwise commerce, where such materials and supplies are loaded upon the ship or vessel for use or consumption in the maintenance and operation thereof; nor to repair services performed upon ships or vessels operating exclusively in foreign or interstate coastwise commerce; nor to the materials and supplies used in such repairs where such materials and supplies enter into and become a component part of such ships or vessels; nor to laundry services performed for the owners or operators of such ships or vessels operating exclusively in foreign or interstate coastwise commerce, where the laundered articles are to be used in the course of the operation of such ships or vessels.

C. The provisions of this Section do not apply to drilling equipment used for oil exploitation or production unless such equipment is built for exclusive use outside the boundaries of the state and is removed forthwith from the state upon completion.

D. The collector shall promulgate rules and regulations designed to carry out the provisions of this Section. Any transaction not strictly in compliance with such rules and regulations shall lose the exemption herein provided.

Added by Acts 1959, No. 51, § 1.

§ 305.3 Exclusions and exemptions; seeds used in planting of crops

The tax imposed by R.S. 47:302(A) (1) shall not apply to the sale at retail of seeds for use in the

planting of any kind of crops. The collector shall promulgate rules and regulations designed to carry out the provisions of this Section, and any transaction not strictly in compliance with such rules and regulations shall lose the exemption herein provided.

Added by Acts 1960, No. 427, § 1.

§ 305.4 Exclusions and exemptions; casing, drill pipe and tubing used in offshore drilling

The sales tax does not apply to casing, drill pipe and tubing sold in Louisiana, for use offshore beyond the territorial limits of the state, for the production of oil, gas, sulphur and other minerals.

Added by Acts 1961, No. 47, § 1.

§ 305.5 Exclusions and exemptions; materials and supplies used in the construction of the Toledo Bend Dam Project

The sales and use taxes imposed by the state of Louisiana or any such taxes imposed by any parish or municipality within the state shall not apply to or be collected on any materials, supplies or products for use in connection with any phase of the construction of the Toledo Bend Dam Project on the Sabine River. The collector of revenue shall promulgate rules and regulations designed to carry out the provisions of this Section, and any transactions not strictly in compliance with such rules and regulations shall lose the exemption herein provided.

Added by Acts 1962, No. 156, § 1.

§ 305.6 Exclusions and exemptions; Little Theater tickets

The sales tax imposed by R.S. 47:302 shall not apply to the sale of admission tickets by Little Theater organizations.

Added by Acts 1962, No. 226, § 1.

§ 305.7 Exclusions and exemptions; tickets to musical performances of nonprofit musical organizations

The sales tax imposed by R.S. 47:302 shall not apply to the sale of admission tickets by domestic nonprofit corporations or by any other domestic nonprofit organization known as a symphony organization or as a society or organization engaged in the presentation of musical performances; provided that this Section shall not apply to performances given by out-of-state or nonresident symphony companies, nor shall this Section apply to any performance intended to yield a profit to the promoters thereof.

Added by Acts 1963, No. 124, § 1. Amended by Acts 1964, No. 198, § 1.

§ 305.8 Exclusions and exemptions; pesticides used for agricultural purposes

The tax imposed by R.S. 47:302(A) shall not apply to sale at retail of pesticides used for agricultural purposes, including particularly but not by way of limitation, insecticides, herbicides and fungicides.

Added by Acts 1964, No. 79, § 1.

§ 305.9 Exclusions and exemptions; motion picture film rental

The sales and use taxes imposed by the State of Louisiana or any such taxes imposed by any parish or municipality within the state shall not apply to the amount paid by the operator of a motion picture theatre to a distributing agency for use of films of photoplay.

Added by Acts 1964, No. 27, § 1.

§ 305.10 Exclusions and exemptions; property purchased for use outside the state

There shall be no sales tax due upon the sale at retail of tangible personal property purchased within Louisiana for use exclusively beyond the territorial limits of Louisiana. If tangible personal property purchased tax free under the provisions of this Section is later brought into Louisiana for use herein the property shall be subject to the Louisiana use tax as of the time it is brought into the state for use herein, subject to the credit provided in R.S. 47:303(A).

If the first use of tangible personal property purchased in Louisiana for use beyond the territorial limits of the state occurs in a state which imposes a sales or use tax, the exemption provided herein shall apply only if:

1. The purchaser is properly registered for sales and use tax purposes in the state of use and regularly reports and pays sales and use tax in such other state; and

2. The state in which the first use occurs grants

on a reciprocal basis a similar exemption on purchases within that state for use in Louisiana; and

3. The purchaser obtains from the Collector of Revenue of Louisiana a certificate authorizing him to make the nontaxable purchases authorized under this Section.

The Collector of Revenue shall promulgate regulations for the implementation of this Section.

Added by Acts 1964, No. 172, § 1.

§ 306. Returns and payment of tax; penalty for absorption of tax

A. **General provisions.** The taxes levied hereunder shall be due and shall be payable monthly. For the purpose of ascertaining the amount of tax payable all dealers shall, on or before the 20th day of the month following the month in which this tax becomes effective, transmit to the collector, upon forms prescribed, prepared and furnished by him, returns showing the gross sales, purchases, gross proceeds from lease or rental, gross payments for lease or rental, gross proceeds derived from sales of services, or gross payments for services, as the case may be, arising from all taxable transactions during the preceding calendar month; and hereafter, like returns shall be prepared and transmitted to said collector by all dealers, on or before the 20th day of each month for the preceding calendar month. These returns shall show any further information the collector may require to enable him to correctly compute and collect the tax levied. Every dealer at the time of making the return required hereunder, shall compute and remit to the collector the re-

quired tax due for the preceding calendar month; and failure to so remit such tax shall cause said tax to become delinquent.

Gross proceeds from rentals or leases shall be reported and the tax shall be paid with respect thereto, in accordance with the rules and regulations the collector may prescribe.

For the purpose of compensating the dealer in accounting for and remitting the tax levied by this Chapter, each dealer shall be allowed two per centum (2%) of the amount of tax due and accounted for and remitted to the collector in the form of a deduction in submitting his report and paying the amount due by him; provided the amount due was not delinquent at the time of payment and provided further that the amount of any credit claimed for taxes already paid to a wholesaler shall not be deducted in computing the commission allowed the dealer hereunder. Provided that municipalities are hereby authorized to pay compensation to their sales tax dealers in any amounts designated by the governing body of said municipality.

The collector, for good cause, may extend, for not to exceed thirty days, the time for making any returns required under the provisions of this Chapter.

For the purpose of collecting and remitting to the state the tax imposed by this Chapter, the dealer is hereby declared to be the agent of the state.

B. **Collection by wholesalers.** Notwithstanding the provisions of Subsection A above or any other provi-

sion of this Chapter, every manufacturer, wholesaler, jobber or supplier who sells to anyone for sale at retail any article of tangible personal property the retail sale of which is taxable under this Chapter, shall collect as advance sales tax, two per centum of the sales price of such article at the time of sale.

The amount paid by dealers to manufacturers, wholesalers, jobbers or suppliers shall be advance payment of the Louisiana sales tax which the dealer is required to collect upon the sale at retail, and the advance payment is required only as a means of facilitating collection of the sales tax.

Manufacturers, wholesalers, jobbers and suppliers who collect advance sales tax from their purchasers pursuant to the preceding provisions, shall remit the tax to the collector of revenue in the manner provided hereinabove for dealers and in accordance with the rules and regulations prescribed by the collector.

In making their returns to the collector, dealers who have paid advance sales tax shall deduct from the total tax collected by them upon the retail sale of the commodity the amount of tax paid by them to manufacturers, wholesalers, jobbers and suppliers during the period reported provided tax paid invoices evidencing the payment are retained by the dealer claiming the refund or credit. If the amount so paid during any reporting period amounts to more than the tax collected by him for the period reported, the excess so paid shall be allowed as a refund or credit against the tax collected by the dealer during the succeeding period or periods.

Manufacturers, wholesalers, jobbers and suppliers collecting advance sales tax as hereinabove provided shall be allowed a two per centum deduction from the amount so collected and remitted to the collector as compensation for such collection. The two per centum compensation shall not be allowed if the report and payment of the manufacturer, wholesaler, jobber or supplier is not timely filed.

Parishes, municipalities, school boards and other local governing bodies, except as hereinafter set forth, which levy a sales tax are hereby prohibited from requiring manufacturers, wholesalers, jobbers or suppliers to collect such sales taxes in advance from dealers to whom they sell. Absorption of said tax as defined in this paragraph by any retailer, wholesaler, manufacturer or other supplier shall constitute a misdemeanor and upon conviction shall be punished by a fine of no more than two thousand dollars or by imprisonment in the parish jail for no more than two years. The parish, municipal, school board and other local governing authorities of Orleans Parish are hereby authorized to require manufacturers, wholesalers, jobbers and suppliers to collect sales taxes levied by them in advance from dealers to whom they sell; provided, however, that such advance collections shall be subject to the same laws, rules and regulations as are applicable to advance collections of state sales taxes, and provided further that said dealers and the wholesalers, manufacturers, jobbers and suppliers are domiciled in Orleans Parish.

Amended by Acts 1954, No. 491, § 1; Acts 1964, Ex.

Sess., No. 9, §§ 1, 3; Acts 1965, No. 11, § 1; Acts 1968, Ex.Sess., No. 52, § 1.

§ 306.1 Collection from interstate and foreign transportation dealers

Persons, as defined in this Chapter, engaged in the business of transporting passengers or property for hire in interstate or foreign commerce, whether by railroad, railway, automobile, motor truck, boat, ship, aircraft or other means, may, at their option under rules and regulations prescribed by the collector, register as dealers and pay the taxes imposed by R.S. 47:302 A on the basis of the formula hereinafter provided.

Such persons, when properly registered as dealers, may make purchases in this state or import property into this state without payment of the sales or use taxes imposed by R.S. 47:302 A at the time of purchase or importation, provided such purchases or importations are made in strict compliance with the rules and regulations of the collector. Thereafter, on or before the 20th day of the month following the purchase or importation, the dealer shall transmit to the collector, on forms secured by him, returns showing gross purchases and importations of tangible personal property, the cost price of which has not previously been included in a return to the state. The amount of such purchases and importations shall be multiplied by a fraction, the numerator of which is Louisiana mileage operated by the taxpayer and the denominator of which is the total mileage, to obtain the taxable amount of tax basis. This amount shall be multiplied by the tax rate to disclose the tax due.

Each such dealer, at the time of making the return required hereunder, shall remit to the collector the tax due for the preceding calendar month as shown on the return.

Added by Acts 1956, No. 438, §1. Amended by Acts 1958, No. 440, §1.

§ 307. Collector's authority to determine the tax in certain cases

A. In the event any dealer fails to make a report and pay the tax as provided in this Chapter or in case the dealer makes a grossly incorrect report or a report that is false or fraudulent, the collector shall make an estimate of the retail sales of such dealer for the taxable period, of the gross proceeds from rentals or leases of tangible personal property by the dealer, or the cost price of all articles of tangible personal property imported by the dealer for use or consumption or distribution or storage to be used or consumed in this state, and of the gross amounts paid or charged for services taxable; and it shall be the duty of the collector to assess and collect the tax together with any interest and penalty that may have accrued thereon, which assessment shall be considered prima facie correct and the burden to show the contrary shall rest upon the dealer.

B. In the event the dealer has imported tangible personal property and he fails to produce an invoice showing the cost price of the articles which are subject to tax, or the invoice does not reflect the true or actual cost, then the collector shall ascertain in any manner

feasible the true cost price and shall assess and collect the tax, together with any interest and penalties that may have accrued, on the basis of the true cost as assessed by him. The assessment so made shall be considered prima facie correct, and the burden shall be on the dealer to show the contrary.

C. In the case of the lease or rental of tangible personal property, if the consideration given or reported by the dealer does not, in the judgment of the collector, represent the true or actual consideration, then the collector is authorized to ascertain in any manner feasible the true or actual consideration and assess and collect the tax thereon together with any interest and penalties that may have accrued. The assessment so made shall be considered prima facie correct and the burden shall be on the dealer to show the contrary.

D. In the event such estimate and assessment requires an examination of books, records, or documents, or an audit thereof, then the collector shall add to the assessment the cost of such examination, together with any penalties accruing thereon. Such costs and penalties when collected shall be remitted to the State Treasurer in the same manner as the taxes are remitted to him by the collector.

§ 308. Termination or transfer of business

If any dealer liable for any tax, interest or penalty levied hereunder sells his business or stock of goods or quits the business, he shall make a final return and payment within fifteen days after the date

of selling or quitting the business. His successor, successors or assigns, if any, shall withhold sufficient of the purchase money to cover the amount of such taxes, interest and penalties due and unpaid until such time as the former owner shall produce a receipt from the collector showing that they have been paid, or a certificate stating that no taxes, interest or penalties are due. If the purchaser of a business or stock of goods fails to withhold purchase money as above provided, he shall be personally liable for the payment of the taxes, interest and penalties accrued and unpaid on account of the operation of the business by any former owner, owners or assigns.

§ 309. Dealers required to keep records

Every dealer required to make a report and pay any tax under this Chapter shall keep and preserve suitable records of the sales, purchases, or leases taxable under this Chapter, and such other books of accounts as may be necessary to determine the amount of tax due hereunder, and other information as may be required by the collector; and each dealer shall secure, maintain and keep, for a period of three years, a complete record of tangible personal property received, used, sold at retail, distributed, or stored, leased or rented, within this state by the said dealer, together with invoices, bills of lading, and other pertinent records and papers as may be required by the collector for the reasonable administration of this Chapter, and a complete record of all sales or purchases of services taxable under this Chapter. These records shall be open for inspection to the collector at all reasonable

hours. The collector is authorized to require all dealers who take deductions on their sales tax returns for total sales under the minimum taxable bracket prescribed by him pursuant to R.S. 47:304 to support their deductions by keeping written or printed detailed records of said sales in addition to their usual books and accounts.

Any dealer subject to the provisions of this Chapter who violates the provisions of this Section shall be fined not more than two hundred dollars, or imprisoned for not more than sixty days, or both, for any such offense.

§ 310. Wholesalers and jobbers required to keep records

All wholesale dealers and jobbers in this state shall keep a record of all sales of tangible personal property made in this state whether such sales be for cash or on terms of credit. These records shall contain and include the name and address of the purchaser, the date of the purchase, the article purchased and the price at which the article is sold to the purchaser. These records shall be kept for a period of three years and shall be open to the inspection of the collector at all reasonable hours.

Whoever violates the provisions of this Section shall be fined not less than fifty dollars nor more than two hundred dollars, or imprisoned for not more than ten days nor more than thirty days, or both, for the first offense. For the second or each subsequent offense, the penalty shall be double.

§ 311. Collector's authority to examine records of transportation companies

The collector is specifically authorized to examine at all reasonable hours, the books, records and other documents of all transportation companies, agencies, or firms operating in this state, whether they conduct their business by truck, rail, water, airplane, or otherwise, in order to determine what dealers are importing or are otherwise shipping articles of tangible personal property subject to the tax levied by this Chapter. When any such transportation company refuses to permit the examination of its books, as provided in this Section, the collector may proceed by rule against it, in term time or in vacation, in any court of competent jurisdiction in the parish where such refusals occurred, to show cause why the collector should not be permitted to examine its books, records or other documents. This rule may be tried in open court or in chambers, and in case the rule is made absolute, the same shall be considered a judgment of the court, and every violation thereof shall be considered as a contempt of court and punished according to law.

§ 312. Failure to pay tax on imported tangible personal property; grounds for attachment

The failure of any dealer to pay the tax and any interest, penalties, or costs due under the provisions of this Chapter on any tangible personal property imported from outside the state for use, consumption, distribution or storage to be used in this state, or imported for the purpose of leasing or renting the same, shall make the tax, interest, penalties, or costs ipso

facto delinquent. This failure shall moreover be a sufficient ground for the attachment of the personal property imported wherever it may be found, whether the delinquent taxpayer is a resident or nonresident, and whether the property is in the possession of the delinquent taxpayer or in the possession of other persons.

It is the intention of this law to prevent the disposition of the said tangible personal property in order to insure payment of the tax imposed by this Chapter, together with interest, penalties and costs, and authority to attach is hereby specifically granted to the collector. The procedure prescribed by law in attachment proceedings shall be followed except that no bond shall be required of the State.

§ 313. System of import permits; seizure and forfeiture of vehicles used in importing without permit

A. In order to prevent the illegal importation of tangible personal property which is subject to tax, and to strengthen and make more effective the manner and method of enforcing payment of the tax imposed by this Chapter, the collector is hereby authorized to put into operation a system of permits whereby any person or dealer may import tangible personal property by truck, automobile, or other means of transportation other than a common carrier, without having the truck, automobile or other means of transportation seized and subjected to legal proceeding for its forfeiture. Such system of permits shall require the person or dealer who desires to import tangible personal property subject to tax imposed by this Chapter, to ap-

ply to the collector for a permit, stating the kind of vehicle to be used, the name of the driver, the license number of the vehicle, the kind or character of tangible personal property to be imported, the date, the name and address of the consignee, and such other information as the collector may deem proper or necessary. These permits shall be free of cost to the applicant and may be obtained at any of the branch offices of the department of revenue, including the branch offices located at Shreveport and Lake Charles.

B. The importation into this state of tangible personal property which is subject to tax, by truck, automobile, or other means of transportation other than a common carrier, without having first obtained a permit described above, (if the tax imposed by this Chapter has not been paid), is prohibited and shall be construed as an attempt to evade payment of the tax; and the truck, automobile, or means of transportation other than a common carrier, as well as the taxable property may be seized by the collector in order to secure the same as evidence in a trial, and it shall be subject to forfeiture and sale in the manner provided for in this Chapter.

C. The collector is authorized in a summary proceeding, or by an action against the owner or operator of any truck, automobile or means of transportation other than a common carrier, used in the illegal importation and transportation of any article or articles of tangible personal property on which a tax is levied by this Chapter, and on which the tax has not been paid, to demand the forfeiture and sale of the truck,

automobile or other means of transportation, together with the said taxable property, used in the illegal importation and in violation of this Chapter.

D. In all cases where it is made to appear by affidavit that the residence of the owner of the automobile, truck or other means of transportation is out of the state, or is unknown to the collector, the court having jurisdiction of the proceeding shall appoint an attorney at law to represent the absent owner against whom the proceeding shall be tried contradictorily within ten days after the filing of the same. The affidavit may be made by the collector or one of his assistants, or by the attorney representing the collector, if it is not convenient to obtain the affidavit of the collector or one of his assistants. The attorney appointed to represent the absent owner may waive service and citation of the petition or rule, but he shall not waive any legal defense. If, upon the trial of the proceeding, it is established that the automobile, truck, or other means of transportation, has been used to transport any article of tangible personal property upon which a tax is levied by this Chapter, and upon which the tax has not been paid, without first having obtained a permit from the collector as provided herein, then the court shall render judgment accordingly, declaring the forfeiture of the taxable property and of the automobile, truck, or other means of transportation and ordering the sale thereof after ten days' notice by advertisement in the official parish paper where the seizure is made, by the civil sheriff of the parish of Orleans, or by the sheriff of the parish in which the seizure is

made; this sale shall be made at public auction at the court house, to the highest bidder, for cash, and without appraisement. It is the intent and purpose of these proceedings to afford the owner of the automobile, truck or other means of transportation a fair opportunity for hearing in a court of competent jurisdiction. It is further the intent and purpose of these proceedings that the forfeiture and sale of the automobile, truck or other means of transportation, and of the taxable property being transported therein, shall be and operate as a penalty for the violation of this Chapter by the illegal transportation and importation of tangible personal property subject to the tax; and the payment of the tax due on the article upon which a tax is levied by this Chapter, at the moment of seizure or thereafter, shall not operate to prevent, abate, discontinue or defeat the forfeiture and sale of the property. All funds collected from the seized and forfeited property shall be paid into the state treasury and credited in the same manner as provided for the tax herein levied. The court shall fix the fee of the attorney representing the owner when appointed by the court, at a nominal sum not to exceed ten per centum (10%) to be taxed as costs and to be paid out of the proceeds of the sale of the property.

§ 314. Failure to pay tax; rule to cease business

Failure to pay any tax due as provided in this Chapter shall ipso facto, without demand or putting in default, cause the tax, interest, penalties, and costs to become immediately delinquent, and the collector has the authority, on motion in a court of competent juris-

diction, to take a rule on the dealer, to show cause in not less than two or more than ten days, exclusive of holidays, why the dealer should not be ordered to cease from further pursuit of business as a dealer. This rule may be tried out of term and in chambers, and shall always be tried by preference. If the rule is made absolute, the order rendered thereon shall be considered a judgment in favor of the state, prohibiting the dealer from the further pursuit of said business until such time as he has paid the delinquent tax, interest, penalties and costs, and every violation of the injunction shall be considered as a contempt of court, and punished according to law. For the purpose of the enforcement of this Chapter and the collection of the tax levied hereunder, it is presumed that all tangible personal property imported or held in this state by any dealer is to be sold at retail, used or consumed, or stored for use or consumption in this state, or leased or rented within this state, and is subject to the tax herein levied; this presumption shall be prima facie only, and subject to proof furnished to the collector.

§ 315. Sales returned to dealer; credit or refund of tax

In the event tangible personal property sold is returned to the dealer by the purchaser or consumer or in the event the amount paid or charged for services is refunded or credited to the purchaser or consumer after the tax imposed by this Chapter has been collected, or charged to the account of the purchaser, consumer, or user, the dealer shall be entitled to reimbursement of the amount of tax so collected or charged

by him, in the manner prescribed by the collector; and in case the tax has not been remitted by the dealer to the collector, the dealer may deduct the same in submitting his return. Upon receipt of a sworn statement of the dealer as to the gross amount of such refunds during the period covered by the sworn statement, which period shall not be longer than ninety (90) days, the collector shall issue to the dealer an official credit memorandum equal to the net amount remitted by the dealer for the tax collected. This memorandum shall be accepted by the collector at full face value from the dealer to whom it is issued, in the remittance for subsequent taxes accrued under the provisions of this Chapter.

In cases where a dealer has retired from business and has filed a final return, a refund of tax may be made if it can be established to the satisfaction of the collector that the tax paid was not due.

§ 316. Collector to provide forms

The collector shall design, prepare, print and furnish to all dealers, or make available to them, all necessary forms for filing returns, and instructions to insure a full collection from dealers and an accounting for the taxes due; but failure of any dealer to secure these forms shall not relieve the dealer from the payment of the tax at the time in the manner herein provided.

§ 317. Cost of collection

The cost of preparing and distributing the report forms and paraphernalia for the collection of the tax,

and of the inspection and enforcement duties required herein, shall be borne by the revenue produced by this Chapter, and the collector shall withhold from the first sums realized on the collection of the tax levied hereunder, a sum not to exceed $1,100,000 per annum.

Amended by Acts 1954, No. 314, § 1; Acts 1957, No. 19, § 1; Acts 1964, Ex.Sess., No. 9, § 2.

§ 318. Disposition of collections

A. All taxes collected under the provisions of this Chapter shall be paid to the collector, and the proceeds of all taxes collected under the provisions of this Chapter, less the commission to dealers, and the cost of collecting the taxes as herein provided for, shall be paid by the collector to the State Treasurer on or before the tenth day of the month following the collection of the tax; and the remainder of the amounts paid shall be credited to a special fund to be known as the Public Wefare Fund, except as otherwise provided by law.

B. The Department of Public Welfare shall make withdrawals from the Public Welfare Fund for the payment of old age assistance and other welfare purposes.

Amended by Acts 1953, Ex.Sess., No. 3, § 1; Acts 1961, 2nd Ex. Sess., No. 10, § 1; Acts 1962, No. 148, § 1; Acts 1963, No. 27, § 1; Acts 1968, No. 36, § 1.

Appendix "6"

Re: Testimony in trial court by Chapman L. Sanford concerning execution of Halliburton stipulation

CHAPMAN L. SANFORD, called as a witness on behalf of the defendant, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NORRIS:

Q Would you please state your name and occupation.

A Chapman L. Sanford. I'm a practicing attorney.

Q Would you please state whether you have ever been employed by the Department of Revenue; and, if so, in what capacity and during what time period?

A Well, the answer is yes; as an attorney.

Q The time periods giving you problems?

A Probably from 1956 to 1968, sometime; part of the time as General Counsel.

Q While you were employed as an attorney for the Department: Did you have any connection whatever with the preparation or the entering into or signing of any stipulation in Halliburton Oil Well Cementing Company versus Riley?

A The name escapes me; but, if that's the name of the Halliburton case.

Q That's the Halliburton case, yes.

A I had something to do with it, I signed it.

Q Would you please describe to the Court —

A That's all I had to do with it.

Q Please describe to the Court the circumstances surrounding your signing that stipulation.

A To the best of my recollection, the case originally was being handled by Roy M. Lilly, Jr., whose father was killed in an automobile accident. And, at that time, Mr. Lilly, Sr., was building a highway for the State Department of Highways. And, his son, Roy Lilly, Jr., undertook to complete that. At that time, he was not in the office very much.

Q In other words, Roy Lilly, prior to his father's death, was employed by the Revenue Department?

A Yes, and immediately after. But, he was, at that time, handling this case and also completing that road project. And, I recall that Roy Lilly called me on the phone and told me that B. B. Taylor was coming up with the stipulation; that he had worked on the stipulation at great length with Mr. Taylor, and asked me to sign it. As I recall, I demurred at first and did not want to sign it because I didn't have any idea what the case was about nor what the issues were. And, he gave me assurance that it would be all right to sign it; and that, it had gone long enough; and that, B. B. had apparently worked hard on it; and, would like to get it signed to get the case underway. And, when Mr. Taylor brought it up, I signed it. I don't believe that I read it; although, I'm sure that B. B. probably read it to me.

Q Do you recall basically what that stipulation said? In other words, have you come across it or has it been brought to your attention later as to what was contained in that stipulation and whether or not it was correct?

A I'm basically familiar with the quotation used by

the Supreme Court of the United States in making its decision in this case. And, that portion of it only. And, I'm not really familiar with the details of the words used. And, I know that immediately after the signing sometime when I went back over this stipulation with Mr. Lilly, and, apparently the case was going to come to me for handling. I don't know whether Mr. Lilly was leaving or left. And, I don't know the time interval; but, I took the position that there was a statement in it that was wrong. And, that's the very statement from which the U. S. Supreme Court made its decision. I told Mr. Lilly I thought it was wrong. I don't recall his reply. The case evolved upon me; and, I recall making a decision whether—having to make the decision whether or not I would continue with the case; contest the error or go with it as it was. I decided that I could win the case with the stipulation as it was because I thought it was explainable even in that context. I still do, but, it was wrong as a matter of fact, I believe.

MR. NORRIS: No further questions. I tender the witness.

WITNESS TENDERED

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APPENDIX "7"

Re: Testing in trial court by Roy M. Lilly concerning execution of Halliburton **stipulation**

ROY M. LILLY, JR., called as a witness on behalf of the defendant, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NORRIS:

Q Would you please state your name and occupation?

A Roy M. Lilly, Jr., attorney-at-law.

Q Have you ever been employed by the Department of Revenue; and, if so, in what capacity and during what time period?

A I was employed as an attorney in the legal section, I believe, from '57 to about '60, somewhere in there. during roughly that period.

Q During your employement with the Department of Revenue: Did you have any dealings with the execution or the signing or causing anyone to sign a stipulation regarding the Halliburton case as to treatment of in-state taxpayers versus out-of-state taxpayers?

A Yes.

Q Would you please describe to the Court the situation.

A As I recall it, Mr. Taylor and I worked out the stipulation over a long period of time. We would go over draft after draft after draft. The signing of it was not done by me, by my hand, but, at my

direction. One day I was leaving town. At that time, I had a radio in my car. I was just with the Department part-time. My father had died; and, I went into the road contracting business. And, Chapman caught me just—I don't know why I remember, but I remember just as I was turning on to go over the Mississippi River Bridge, and, said, that Mr. Taylor was in the office with the stipulation; that I'd forgotten an appointment with him, I believe, or he was there at any rate. And, I told him that we had reached a final agreement. I hadn't seen the last draft; but, I was positive that it would be the way we had agreed on. We had written it out in the office with longhand notations and changes; and, he had had it typed, but I was positive that it was the way we had agreed on. And, I asked him to sign it.

Q You asked who to sign it?

A Mr. Sanford to sign it for me. And, he did. As I recall, he wasn't too anxious to; he wanted me to read it; but, I said, oh, go on and sign it, and save Mr. Taylor a trip.

Q Do you recall basically what that stipulation said which was considered very heavily by the U. S. Supreme Court in its final decision?

A Yes. I don't remember us discussing it at the time we were doing it. I have no doubt that we did. It was not something that I considered too important. The next time we discussed the stipulation in the office, I was advised that that wasn't the policy. And, I said, well, it doesn't matter because that isn't the way we're doing our case anyhow. I have had various epithets directed at me since then for making that stipulation.

Q In other words, that stipulation was in error or not?

A Apparently, it was in error. I stipulated that it was Department policy on something that apparently was not Department policy. Until the Supreme Court decision, it didn't worry me because that isn't the way that I looked at the case anyway. The Supreme Court said it was very important.

MR. NORRIS: No further questions. I tender the witness.

WITNESS TENDERED

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